IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LTD.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgement of the United States District Court for the Northern District of Ohio, Western Division (Celebrezze, Circuit Judge, and Young and Walinski, District Judges), entered on April 20, 1973, holding Ohio Revised Code Sections 3767.04 and 3767.06 to be unconstitutional and enjoining appellants herein from executing that portion of the Allen County Common Pleas Court's final judgment of Nov. 30, 1972, in *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al*, Court of Common Pleas of Allen County, Ohio, Case Number 72 CIV 0326,

which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio "for a period of one year unless sooner released by order of (the Common Pleas) Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the revised Code of Ohio".

OPINION BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division, has not been reported as yet. A copy of the Opinion and Order, as filed on April 20, 1973, is attached hereto at Appendix A, pp. 3-12.

JURISDICTION

On Dec. 1, 1972, Appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd., v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio and Edward Fair, in his capacity as Sheriff of Allen County, Ohio,* CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Sections 1983 and 1985, together with motions for a temporary restraining order, preliminary and final injunction, and an application for a 3-judge court. On Dec. 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, and District Court Judges Nicholas J. Walinski and Don J. Young as members of the Three-Judge District Court, which subsequently handed down the aforementioned opinion and order dated April 20, 1973. The Notice of Appeal was filed in the United States District Court on May 14, 1973. Appellants petitioned this Court for a Writ of Mandate or Prohibition in *Huffman et al v. The United States District Court for The Northern District of Ohio, Western Division et al,* No. 72-1613, docketed on June 1, 1973, which matter is presently pending before this Court. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sections 1253 and 2101(b).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Bailey v. Patterson*, 369 U.S. 31, 34, 7 L.Ed. 2d 512, 82 S.Ct. 549 (Feb. 26, 1962).

QUESTIONS PRESENTED

(1) (a) Whether it was the intent of Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. Sections 1983 and 1985), to authorize a federal cause of action, where the state action against which relief is sought, is a civil action in rem brought in the name of the people of the State of Ohio, which pleads specifically the violation of specific state standards for sexual conduct in public in the form of obscene motion picture films being exhibited as a regular course of conduct, and which seeks to abate the place where such conduct takes place, as a disorderly house.

(b) Assuming that, in theory, a cause of action can be stated under 42 U.S.C. Section 1983 and 1985 of the Civil Rights Act, whether Pursue Ltd. failed to plead the highly specific facts required for such a cause of action, and whether the federal court erred in failing to examine the course of conduct which was alleged and proved in the state court action, and presented in Appellant's Motion to Dismiss.

(2) Whether the facts alleged provide a basis for equitable jurisdiction and federal intervention under *Younger v. Harris* and *Mitchum v. Foster;* and whether such facts presented a substantial federal question for the invocation of a three-judge district court to consider the constitutionality of the Ohio Nuisance Statute.

(3) Whether, under the doctrine of lis pendens, Pursue Ltd. had standing, under an assignment of the leasehold interest in 69 Public Square, Allen County, Ohio, to prosecute the Civil Rights action entitled, *Pursue, Ltd. v. Huffman, et al.*, 72 C 432, filed by it on Dec. 1, 1972; where, on the date that Pursue, Ltd. acquired such interest from William H. Dakota, Nov. 17, 1972, a civil action entitled *Ohio ex rel Huffman v. William H. Dakota, et al., 72* CIV 0326 was on

file in the Allen County, Ohio, Common Pleas Court, seeking to abate the premises and forfeit the lease at 69 Public Square; of which filing appellee Pursue Ltd. had actual notice from the inception of its existence as a corporation, through its incorporating attorneys and also by service of process on Robert Hollis, its president, on Nov. 22, 1972; which complaint described said premises both by metes and bounds and and by street address and named the owners of such real property and assignor, William H. Dakota as defendants, and over which property and persons the Allen County Common Pleas Court had acquired jurisdiction; and where on Nov. 30, 1972, the day before such federal action was filed by Pursue, Ltd., a final judgment was entered in the Allen County Common Pleas Court, forfeiting for a period of one year the leasehold interest of defendant-assignor William H. Dakota in the premises of 69 Public Square upon which interest Pursue, Ltd. was relying; and where such final judgment was known to appellee at the time such federal action was filed, having been alleged as a fact by Pursue, Ltd. in its Complaint at page 5, paragraph 18.

(4) Whether, under the manditory provisions of 28 U.S.C. Section 2283, the United States District Court had authority to grant any injunctive relief; i.e., whether the equitable claim should not have been dismissed for lack of jurisdiction, where it appeared on the face of the complaint that:

(a) the real property which was the subject of the action was in custodia lex in the "in rem" state court proceedings, and

(b) the state appellate process was already in train, in that a final judgment had already been entered by the state trial court.

(5) Whether the Ohio obscenity statute, as construed by the Ohio judiciary and as applied by the trial judge, complied with the specificity requirements enunciated in *Miller v. California*, decided by this Court on June 21, 1973.

(6) Whether certain sections of the Ohio Nuisance Statute, entitled "Disorderly Houses" are constitutional: namely,

(a) Whether Section 3767.04 of the Ohio Revised Code is constitutional, i.e., whether under a special statutory procedure declaring a place which exhibits an obscene motion picture film to be a public nuisance and providing for its abatement, the Federal Constitution prohibits the State Legislature from establishing as a mandatory penalty, after a hearing on a temporary injunction had upon five days' notice, that, upon a judicial finding by a trial court that such a public nuisance exists, the leasehold interest where such public nuisance is conducted or maintained and the personal property and contents located and used therein shall be forfeited until final decision is rendered on the application for a permanent injunction unless either of two conditions is shown to exist, namely: 1. That the person "owning, in control, or in charge of the nuisance so enjoined...." affirmatively "shows to the satisfaction of the court. . . that the nuisance complained of is abated. . . .", or 2. That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by the statute and has regained possession of the premises; where such statute also allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein, and to regain possession of such real property by fulfilling three requirements, namely, 1. Payment of all costs incurred; 2. Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until decision by the court on the application for a permanent injunction, and 3. Satisfying the court of his good faith; and where such statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two requirements, namely, 1. Payment of all costs incurred, and 2. Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

(b) Whether Section 3767.06 of the Ohio Revised Code is constitutional, i.e., whether under a special statutory procedure declaring a place which exhibits an obscene motion picture film to be a public nuisance and providing for its abatement, the Federal Constitution prohibits the state legislature from establishing as a mandatory penalty after a hearing on a permanent injunction that, upon a judicial finding by a trial court that such a public nuisance exists, the same shall be abated and the leasehold interest where such public nuisance is conducted or maintained shall be forfeited for a period of one year from the date of the final order of abatement unless sooner released by order of the court, and that the personal property and contents located and used therein and not already released, (as authorized by Section 3767.04), shall be forfeited and sold not earlier than 10 days after such final order of abatement and in the manner provided for the sale of chattels under execution; where such statute also allows the owner of any real property so restricted to renter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely, 1. Payment of all costs incurred; 2. Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and 3. Satisfying the court of his good faith; and where such statute also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements, namely, 1. Payment of all costs incurred, and 2. Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

STATUTORY PROVISIONS INVOLVED

The Ohio Nuisance Statute entitled "Disorderly Houses" being sections 3767.01 through 3767.11 of the Ohio Revised Code, is attached hereto at Appendix B, pages 3-8. The specific standards for the term "obscene" prescribed by the Ohio legislature in Ohio Revised Code section 2905.34 appear herein, at pages 58-59.

STATEMENT OF FACTS

On September 18, 1972, at 1:06 P.M., appellant Lawrence S. Huffman, as prosecuting attorney of Allen County Ohio, filed a complaint in the Court of Common Pleas of Allen County, Ohio, entitled "State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al, Case No. 72 CIV 0326," seeking the abatement of the Cinema I Theatre located at 69 Public Square, Lima, Ohio, as a public nuisance. A copy of said complaint is attached hereto at Appendix C, pages 3-13. Such action was commenced pursuant to Section 3767.03 of the Ohio Revised Code (see Appendix B, at page 4). At the same time, appellant Huffman filed his Motion for Temporary Injunction, a copy of which is attached hereto at Appendix C, pages 14-16.

The Court of Common Pleas assigned appellant Huffman's Motion for Temporary Injunction in State of Ohio ex rel *Huffman v. William H. Dakota* for September 26, 1972, at 9:30 A.M. A copy of said Notice for Hearing is attached hereto at Appendix C, page 17. On the same date, the Clerk of the Common Pleas Court issued a subpoena duces tecum addressed to William H. Dakota and John Does 1 and 2, requiring them to appear and testify on behalf of the plaintiff in said action and to bring with them the 21 motion picture films listed below which were exhibited at that theatre during the dates indicated:

"Man and Wife"	July 12-18, 1972
"Hollywood Babylon", "Down and Dirty", and Previews	July 19-23, 1972
"The Hangup", "The Cutthroats", and Previews	July 25-Aug. 1, 1972
"Wow, Its Cindy", "Hot Spurs", and Previews	Aug. 2-8, 1972

"Prostitution, Pornography, U.S.A." "Oddly Coupled" and Previews	Aug. 9-15, 1972
"Sandra, The Making of a Woman", "Diamond Stud" and Previews	Aug. 16-22, 1972
"Midnight Plowboy", "Tobacco Roody" and Previews	Aug. 23-29, 1972
"The Blue Hour" "The Grabbers" and Previews	Aug. 30-Sept. 5, 1972
"Sweet Georgia", "The Exotic Dreams of Casanova" and Previews	Sept. 6-12, 1972
"Marriage Manual", "Love Under 17", and Previews	Sept. 13-18, 1972
"The Pig Keeper's Daughter", "Please Don't Eat My Mother", and Previews	Sept. 19-25, 1972

A copy of said Subpena Duces Tecum is attached hereto at Appendix C, page 18.

On September 18, 1972, at approximate 2:40 P.M., a deputy sheriff personally served a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum on the following persons at the Cinema I Theatre, 69 Public Square, Lima, Ohio:

John Doe No. 1, later identified as John Brownell; and

John Doe 2, later identified as Robert Smith;

Also served with the documents aforementioned, with the exception of the subpoena duces tecum and in lieu thereof, a subpoena, were John Doe 3, later identified as Allen R. Brown, and Jane Doe No. 1, later identified as Geraldine Scott. At the time of the service of these documents, John Brownell was the projectionist at the Cinema I Theatre; Robert Smith was the person in charge of said theatre in the absence of the manager, William H. Dakota; Allen R. Brown was the ticket taker and Geraldine Scott was the ticket seller.

On the evening of Sept. 18, 1972, William H. Dakota was served with a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum at the Cinema I Theatre, No. 69 Public Square, Lima, Ohio.

The owners of the premises, also named as defendants in appellant Huffman's abatement action, were subsequently served with process.

On Sept. 20, 1972, appellant Huffman filed an amended complaint in the Court of Common Pleas and thereafter copies of the Amended Complaint were served upon all of the persons previously served as aforementioned. A copy of the Amended Complaint is attached hereto at Appendix D, pages 3-8.

On Sept. 26, and Sept. 27, 1972, the Court of Common Pleas of Allen County, Ohio, convened a hearing on appellant Huffman's Motion for Temporary Injunction in State of Ohio *ex rel Huffman v. William H. Dakota et al*, at which time, the defendants in the abatement action were present and represented by counsel. Evidence was presented, including the viewing by the Court of four motion picture films which had been subpoenaed, entitled "Love Under 17", "Marriage Manual", "The Pig Keeper's Daughter", and "Please Don't Eat My Mother," and previews of coming attractions. At the conclusion of the presentation of evidence on Sept. 27, 1972, the court ordered that the matter be continued to Oct. 2, 1972, at which time additional evidence was presented by both the plaintiff and the defendants, after which the parties rested. At no time did the defendants offer any evidence to the court that the nuisance complained against had

been abated. The Court took the matter under advisement and announced that a decision on the temporary injunction would be made forthwith.

On Oct. 24, 1972, the Court of Common Pleas of Allen County, Ohio, announced its decision in State of Ohio *ex rel Huffman v. William H. Dakota et al*, and journalized its order. A copy of such order is attached hereto at Appendix E, pages 3 and 4. In its order the Court made the following findings: 1. That a nuisance exists as alleged at the Cinema I Theatre, 69 Public Square, Lima, Ohio, which should be abated forthwith; 2. That the realty is owned by the defendants Leland Samuel Collins, Flora Mary Collins Moor, and Sara Lee Collins Wallace; and 3. That William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that the defendants Smith, Brown, Brownell and Scott are employed at said theatre. The court ordered the Cinema I Theatre closed, restrained the defendants from removing or in any manner interfering with personal property and contents of the premises at Cinema I Theatre until further order of the Court and ordered the officer serving the Court's order to forthwith make and return into court an inventory of the personal property and contents situated in the building and used in conducting or maintaining the motion picture projection and screening therein. The Court also ordered the defendants to show cause, if any they can, why the closing order should not be made permanent as of that date.

The premises known as Cinema I Theatre, 69 Public Square, Lima, Ohio, was closed pursuant to said order of the Allen County Common Pleas Court and the statutory mandate of O.R.C. Section 3767.04.

On October 26, 1972, William H. Dakota, the defendant in the state abatement action, *Ohio ex rel Huffman v. William H. Dakota et al*, filed a civil rights complaint in the United States District Court, Northern District of Ohio, Western Division, entitled *"William Dakota v. Edward Fair, Sheriff, and Joe Garlock, Deputy Sheriff, Civil Case No. 72-384,"* alleging a cause of action under 42 U.S.C. Section 1983, together with Motions for a Temporary Restraining Order, a Preliminary Injunction, and to convene a 3-judge panel.

Dakota also filed a "Memorandum of Law on Effect of Removal on State Court Action" in the Allen County Common Pleas Court on the same date. A copy of said pleadings is attached hereto at Appendix F, pages 3 to 24. Arguments on the Motion for Temporary Restraining Order were heard on October 30, 1972, and the matter was taken under advisement.

Thereafter, United States Federal District Judge Nicholas J. Walinski, Northern District of Ohio, Western Division, ruled, in an opinion and order filed in said federal action on Nov. 2, 1972, that the injunction of the state court, "has been overbroadly applied" and flew directly in the face of the United States Supreme Court decision in *Near v. Minnesota*, 283 U.S. 697 (1931), and ordered that the state court injunction be stayed "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing." Judge Walinski further stated in his opinion that since the Ohio court may interpret the statute constitutionally upon a hearing for the permanent injunction, he would "reserve a ruling on the convening of a 3-judge panel under 28 U.S.C. Section 2284 until such time as the federal abstention doctrine is inapplicable." A copy of Judge Walinski's opinion and order appear herein at Appendix G, pages 3-4.

In an attempt to comply with Federal District Judge Walinski's order of Nov. 2, 1972, appellant Huffman on Nov. 5, 1972, filed a motion in the state case, *State of Ohio ex rel Huffman v. William H. Dakota, et al*, Court of Common Pleas of Allen County, No. 72 Civ 0326 alleging that on November 4, 1972, William H. Dakota had violated the terms of the Allen County Common Pleas Court order of Oct. 24, 1972 by exhibiting two obscene motion picture films, entitled "Sexual Freedom Now" and "Shoot-out at Beaver Alls (sic)", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio and asked the court to order William Dakota to appear with the films so that the court might determine whether said films were obscene and to show cause why he should not be punished as for a contempt. On the same day, the court ordered that William H. Dakota should appear in Court with said films on November 7, 1972, at 9:00 A.M., which was also the same hearing date previously

scheduled for appellant Huffman's Motion for a Permanent Injunction, so that a determination could be made as to whether such films were obscene and, upon such a determination, to show cause why he should not be punished as for contempt. A copy of said motion and said court order (journal entry) appear hereinafter at Appendix H, pages 3 and 4.

On Nov. 7, 1972, the Court of Common Pleas of Allen County, Ohio, convened and evidence was presented on appellant Huffman's application for a permanent injunction. At the conclusion of the evidence presented on that date, the court, with concurrence of counsel for the plaintiff and the defendants, continued the hearing on the permanent injunction in anticipation that the suit might be settled. The hearings on the application for permanent injunction was rescheduled for Nov. 30, 1972.

On Nov. 22, 1972, upon information and belief that a new party, Robert Hollis[1], was violating the Common Pleas Court order of October 24, 1972, (See Appendix E) by participating in the exhibition of obscene motion picture films at the Cinema I Theatre, appellant Huffman caused a certified copy of the Common Pleas Court order of Oct. 24, 1972, to be personally served upon Robert Hollis.

On Nov. 30, 1972, the Court of Common Pleas of Allen County, Ohio, reconvened in Ohio *ex rel Huffman v. William H. Dakota et al*, on the matter of the application for permanent injunction. Counsel for the defendant William H. Dakota and other defendants employed at the Cinema I Theatre, were not present at said hearing, having advised the court that the court could proceed in the hearing of the cause without the appearance of the defendants or their counsel. Additional evidence was presented by appellant Huffman in such state action, including testimonial evidence from police officers who had viewed 12 other motion picture films which were alleged in appellant Huffman's complaint to have been exhibited at the Cinema I Theatre and to be obscene, and documentary evidence consisting of approxi-

[1] See Appendix AA page 7.

mately 8,000 still photographs in the form of time-motion studies of the said 12 motion picture films. Such time-motion studies consisted of a chronological series of still photographs from the motion picture films, timed in their relative order of appearance, which by stopping the movement appearing on the motion picture screen and recording the same, permitted the type of conduct being portrayed therein to be analyzed by the officer giving testimony as to what he saw exhibited at the motion picture theatre as a part of the past recollection recorded testimony of such witness.

On Nov. 30, 1972, at approximately 2:30 P.M. the Allen County Common Pleas Court granted a permanent injunction and thereafter journalized its order. A copy of said judgment entry appears herein at Appendix I, pages 2-4. In its final judgment, the court made the following findings: 1. That the Cinema I Theatre at 69 Public Square, Lima, Ohio, is operated by defendant William H. Dakota; 2. That the defendant William H. Dakota has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene under the Ohio test for obscenity; 3. That the defendant's conduct and continuous exhibition of obscene motion picture films constitutes a public nuisance as defined by the Ohio Revised Code, Section 3767.01(c); 4. That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins Wallace are the owners of the premises being used by the defendant William H. Dakota to engage in the conduct which constitutes the nuisance; 5. That said owners leased said premises to the defendant William H. Dakota under the name of William Kern, Jr. and that the defendants Brownell, Smith, Brown, and Scott are employed at the theatre. The court ordered the following: 1. Permanently enjoining the defendants and all of the persons acting in concert or participating with them from conducting the said nuisance; 2. Assessed a tax of $300.00 against the Cinema I Theatre and against William H. Dakota personally; 3. Ordered all personal property used in conducting the nuisance as aforesaid to be removed from 69 Public Square, Lima, Ohio, and sold in the manner provided for

the sale of chattels under execution; and 4. Extended its order of Oct. 24, 1972, closing the Cinema 1 Theatre, issued by way of preliminary injunction, and forfeited the lease and ordered it closed for any purpose for a period of one year unless sooner released by order of this court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Ohio Revised Code and ordered the defendant William H. Dakota to pay the costs therein.

Within two hours of the entry of the final judgment forfeiting the lease for a period of one year, the theatre was closed and the keys seized by law enforcement agents. (See page J-7)

On Dec. 1, 1972, appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County, Ohio*, CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Section 1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. A copy of said complaint is attached hereto at Appendix J, pages 3-15.

On Dec. 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an ex parte order in such action, "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C., Section 2248" which ordered the judgment of the Allen County Common Pleas Court in *State ex rel Huffman v. William H. Dakota et al.*, 72-CIV-0326, dated Nov. 30, 1972, stayed except "insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". A copy of said order appears herein at Appendix J, page 16.

In an attempt to enforce the order of the Common Pleas Court of Nov. 30, 1972, while still complying with the federal court order filed on Dec. 1, 1972, appellant filed a motion in the state court in *State ex rel Huffman v. William H. Dakota, et al.*, 72-CIV-0326, on Dec. 4, 1973, requesting that

the films located at 69 Public Square, Lima, Ohio, be viewed by the court and that a judicial determination be made as to whether or not said films were obscene and upon a finding of obscenity, that the court order said films not to be exhibited at 69 Public Square, Lima, Ohio, and set Dec. 4, 1972, as the hearing date. A copy of said motion and notice of hearing appears herein at Appendix K, page 3.

On Dec. 4, 1972, upon notice to counsel for defendant Robert Smith and Robert Hollis, the Court of Common Pleas of Allen County, Ohio, convened in *Ohio ex rel Huffman v. William H. Dakota, et al.* 72 CIV 0326 to hear Appellant Huffman's motion therein for a hearing on said films and the court viewed the motion picture film entitled "Sexual Freedom in Denmark." said film having been subpoenaed by appellant Huffman. The court granted the request of Ted Iorio, counsel for Robert Smith and Robert Hollis, to withhold making a decision as to the obscenity of said motion picture film to enable counsel to present evidence that said motion picture film was not obscene, and set the matter for hearing on Dec. 12, 1972 in the Court of Common Pleas of Allen County, Ohio.

On Dec. 11, 1972, the day prior to said hearing date, counsel Ted Iorio, counsel for Robert Smith and Robert Hollis, filed a petition for removal in the United States District Court for the Northern District, Western Division, entitled *State of Ohio ex rel Lawrence S. Huffman, respondent v. William H. Dakota, et al.*, petitioner, Case No. C72-445, and Notice of Removal with the Clerk of the Allen County Common Pleas Court and served the same on Appellant Huffman. Said removal frustrated appellant's attempt to enforce the state court order while still complying with the federal court's temporary restraining order. A copy of said petition for removal and notice of removal appears herein at Appendix L.

On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski, and Don J. Young as members of the three-judge District Court in *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432. On December 21, 1972, said

three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. Copies of such orders appear herein at Appendix L, pages 18-20.

On December 18, 1972, appellant Huffman filed a motion to remand and supporting memorandum and a motion for immediate hearing, in *William H. Dakota et al. v. Lawrence S. Huffman*, 72 Civ 445, a copy of which appears herein at Appendix L, pages 8-17.

On December 29, 1972, Pursue, Ltd. filed amendments to its complaint in *Pursue, Ltd. v. Huffman, et al.* 72 Civ 432 and on January 5, 1973, appellants filed their answers thereto. A copy of said amendments and answers appears herein at Appendix M, pages 3 to 15.

Appellants herein filed their trial brief in the federal action, *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432 on January 16, 1973. At page 3 of their trial brief, appellants pointed out to the three-judge court that Pursue, Ltd.'s federal lawsuit was spurious, that it constituted an abuse of the federal process and was prosecuted for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition; further, that in view of the evidence in this case, Pursue, Ltd. had no reasonable hope of establishing the necessary prerequisites for success in federal intervention, namely: 1. Bad faith; 2. Harassment; and 3. Great and immediate irreparable harm. In support of those contentions, appellants attached thereto four affidavits of Deputy Sheriff Fred H. Hawk, describing the contents of eight (8) films viewed by said affiant at the Cinema I Theatre subsequent to the federal court order of Nov. 2, 1972, which reopened that theatre, and the alleged assignment of November 24, 1972, from William H. Dakota to Pursue, Ltd. Deputy Sheriff Hawk's description of the eight films viewed by him on the following dates reads as follows:

Dec. 7, 1972

"Affiant says that the credits of 'Skin Flick Madness' showed that it was produced by 'Suckit Films'; that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the

various sexual acts depicted in the stag film and engaging in sexual activity themselves during the stag film; and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio, sexual intercourse, lesbianism and cunnilingus.

'Affiant says that the second feature was entitled 'Okie Maid' which lasted approximately 50 minutes; that the general theme of the movie centered about the sexual activities of three men who lived together in a mountain shack; and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

"Further affiant saith not."

Dec. 14, 1972

"Affiant says that the first feature he viewed was entitled 'The Honeymoon Is Over' which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism, and fellatio.

"Affiant further says that he viewed the second motion picture entitled 'Brit Blazer' which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

"Further affiant saith not."

Dec. 30, 1972

"Affiant says that the first feature he viewed was entitled 'Bells, Books and Balls' which lasted approximately one hour; that there was no general theme of the movie ascertainable by the affiant; and that the movie contained several explicit scenes of nude males

and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

"Affiant says that he viewed the second feature entitled 'Mother Knows Best' which lasted approximately one hour; that the general theme of the movie centered about the sexual adventures of a mother and daughter traveling to the West Coast; that the film contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, lesbianism and cunnilingus.

"Further affiant saith not."

Jan. 10, 1973

"Affiant says that the first motion picture he viewed was entitled 'The Hedonist-Hypnotist' which lasted approximately one hour; that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

"Affiant says that he viewed the second feature entitled 'Documentary of a Madam' which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

"Further affiant saith not."

A copy of Point 3 of the trial brief and the four affidavits of Deputy Sheriff Hawk, referred to above, appears herein at Appendix N, pages 3 to 11.

On February 12, 1973, appellants herein filed three motions with detailed supporting memoranda in *Pursue, Ltd. v. Huffman*, 72 Civ 432, namely: 1. A Motion to Dismiss; 2. A Motion to Dissolve the Temporary Restraining Order, and 3. A Motion for Immediate Hearing. Copies of said motions and the supporting memoranda appear herein at Appendix O, pages 3 to 12. In the memoranda which supported said motions, appellants herein pointed out to the federal court

that the federal action, *Pursue Ltd. v. Huffman*, 72 Civ 432, was a sham pleading brought in bad faith, and that to permit further recognition thereof would only perpetuate the fraud and the resultant gross abuse of the federal judicial process already thrust upon the court. The memorandum in support of the Motion for Immediate Hearing states, in part, as follows (See Appendix O, page 10):

> "In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).
>
> "Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this court is flagrant and without precedent. Unfortunately, this court has been placed in a position of making an order based upon a contention of great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff . . . ."

A copy of the affidavits of the law enforcement officers which described to the court the nature of the subject matter being exhibited at the Cinema I Theatre, during the period January 10-30, 1973, and copies of the time-motion studies of said films, which accompanied said affidavits when they were filed with the three-judge Federal District Court on February 12, 1973, appear herein at Appendix P, pages 1-39. Ap-

pendix Q, pages 1-41, and Appendix R, pages 1-51.

On February 12, 1973, appellants herein also filed a second motion for an immediate hearing with supporting memorandum on the motion to remand in *William H. Dakota v. Huffman, et al.*, 72 CIV 445, previously filed with the Court on December 18, 1972 (see page L-15). A copy of the second motion appears herein at Appendix O, pages 13-16. On March 12, 1973, not having heard anything from the court on the two previous motions for immediate hearings on the motion to remand in *William H. Dakota v. Huffman, et al*, 72 CIV 445, appellants filed an additional memorandum. A copy of the March 12, 1973 memorandum appears herein at Appendix O, pages 17 to 24.

The three-judge Federal District Court heard oral arguments on the temporary restraining order in *Pursue, Ltd. v. Huffman, et al*, 72 CIV 432, on March 12, 1973. A copy of the transcript of the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ of Mandate or Prohibition, in *Huffman et al v. United States District Court for The Northern District of Ohio, Western Division*, No. 72-1613, on file with this Court (See Infra, at page 26). During such proceedings, the court defined the scope of the hearing as:

> "THE COURT: The Court wishes to inform counsel that the only question before this three-judge court is the constitutionality of the so-called Ohio Nuisance Statute. . . ." (T, page 2, lines 8-11.)

and

> ". . . The question, as Judge Celebrezze pointed out is whether or not the Ohio Nuisance Statute, that is Ohio Revised Code 3767.01 and the following sections can be employed to close a theatre as a public nuisance . . . ." (T, page 2, lines 19-22.)
>
> "THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that--well, the question before us is if that was a constitutional section there, we still would also reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T, page 19, lines 16-22.),

While the court indicated at the time that it was considering the constitutionality of the statute as it was being applied in the case, it arbitrarily and unreasonably refused to consider Appellant's motion to dismiss and evidence by way of affidavits on the trial court's finding of a public nuisance. See T, page 29, lines 3-20 and also the four affidavits of Deputy Sheriff Hawk filed with Part 3 of the trial brief and referred to herein at page 43.

On April 20, 1973, the court issued its opinion and order holding the closure portions of the Ohio Nuisance Statute, Sections 3767.04 and 3767.06, unconstitutional and enjoined the appellants herein from executing that portion of the Allen County Common Pleas Court final judgment of November 30, 1972, in *State of Ohio ex rel Huffman v. William H. Dakota, et al.*, 72 CIV 0326, which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio, "for a period of one year unless sooner released by order of Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio . . . ." (See Appendix A, at pages 10 to 12.)

On April 26, 1973, the three-judge Federal District Court, sua sponte, filed an opinion and order dismissing *William Dakota et al. v. State of Ohio ex rel Lawrence S. Huffman*, 72 CIV 445 as being moot. A copy of said order appears herein at Appendix 5, page 3.

On May 1, 1973, appellants herein again sought judicial enforcement of the Ohio Statute in the Common Pleas Court in the civil action, *Ohio ex rel Huffman v. William Dakota, et al.*, 72 CIV 0326. On that date, appellants filed a motion in the Common Pleas Court to determine the obscenity of three motion picture films then being shown at the Cinema I Theatre: "Just Married", "Back Door", and "Bob Dick", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio; and the Common Pleas Court set May 3, 1973, as the hearing date on that motion. A subpoena duces tecum was issued and served on May 1, 1973, upon Robert

Smith, known by the appellants to be the new manager of the Cinema I Theatre, and Projectionist John Doe. Copies of the motion, journal entry and subpoena duces tecum appear herein at Appendix T, pages 3 to 6.

On May 3, 1973, before the scheduled hearing in the Common Pleas Court in *State ex rel Huffman v. Dakota*, 72 CIV 0326 had commenced, the defendants filed a second petition for removal in the Federal District Court, entitled *William H. Dakota v. State ex rel Huffman*, 73 CIV 176, ousting the Common Pleas Court of its jurisdiction in the matter. On May 14, 1973, appellants herein again returned to the Federal Court, this time in *William H. Dakota v. State ex rel Huffman*, 73 CIV 176, and filed a motion to remand with supporting memorandum and a motion for immediate hearing thereon, with supporting memorandum, including the affidavit of Deputy Sheriff Hawk as to the content of the three films. The motion for immediate hearing was overruled on May 22, 1973. Copies of the petition for removal and accompanying papers, and the motion for remand, affidavits, and accompanying papers appear herein at Appendix U, pages 3 to 29.

Having been ousted of jurisdiction in the civil process by the petition for removal filed on May 3, 1973, appellant authorized criminal filings against the manager of the Cinema I Theatre, Robert Smith, in *State of Ohio v. Robert Smith*, 73 CR 093. On May 4, 1973, a summons was issued in lieu of an arrest warrant for Robert Smith, manager of the theatre, supported by a criminal affidavit. At the time of filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court, supported by an affidavit of a policeman who had observed the motion picture films in issue, "Back Door", "Just Married" and "Bob Dick", who described in detail what he saw. The Common Pleas Court signed an order assigning the matter for a hearing on May 7, 1973. At the same time, a subpoena duces tecum was issued for the motion picture films in question, to be served upon Robert Smith, the manager, and Otis Hatfield, the projectionist. On the evening of May 7, 1973, Smith was served with copies of all of the abovementioned papers and Otis

Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers appear herein at Appendix V, pages 3 to 10.

On May 7, 1973, before the scheduled hearing in the Common Pleas Court had commenced, the defendant in *State of Ohio v. Smith*, 73 CR 093, filed a petition for removal in the Federal District Court, entitled *Smith v. State of Ohio*, 73 C 180. On May 14, 1973, appellants herein again returned to the Federal District Court and filed a motion for remand with supporting memorandum, and a motion for immediate hearing with supporting memorandum. The motion for immediate hearing was overruled on May 22, 1973. Copies of the petition for removal in *Smith v. State of Ohio*, 73 C 180, and accompanying papers, and petitioners' motion to remand and accompanying papers appear herein at Appendix W, pages 3 to 21.

On May 8, 1973, petitioner again filed criminal charges, this time against both the manager and the theatre in *State of Ohio v. Smith*, 73 CR 098 and *State of Ohio v. Pursue, Ltd.* 73 CR 099.

On May 8, 1973, in *State of Ohio v. Smith*, 73 CR 098, a summons was issued in lieu of an arrest warrant for Robert Smith, as manager of the Cinema I Theatre, supported by a criminal affidavit. At the time of the filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court supported by an affidavit of a policeman who had observed the motion picture films at issue, "The Wedding" and "Sex And The Working Girl", who described in detail what he saw. The Common Pleas Court by journal entry assigned the matter for a hearing on May 10, 1973, and a subpoena duces tecum was issued for the motion picture films in question. On the evening of May 8, 1973, Robert Smith was served with copies of all of the above papers and Otis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers appear herein at Appendix X, pages 3 to 10.

On May 8, 1973, in *State of Ohio v. Pursue, Ltd.*, 73 CR 099, a summons was issued in lieu of an arrest warrant supported by a criminal affidavit. At the time of the filing of the

affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court, supported by an affidavit of the policeman who had observed the motion picture films at issue, who described in detail what he saw. The Common Pleas Court, by journal entry, assigned the matter for a hearing on May 10, 1973, and a subpoena duces tecum was issued for the motion picture films in question. On the evening of May 8, 1973, manager Robert Smith was served with copies of all of the above papers as the agent of Pursue, Ltd., pursuant to Ohio Rules of Civil Procedure which were applicable as to the service of process upon a corporate defendant. Otis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers appear herein at Appendix Y, pages 3 to 10.

On May 10, 1973, a hearing was conducted in *State of Ohio v. Pursue, Ltd.*, 73 CR 099. Prior to the entry of a plea, Pursue, Ltd. moved to quash the service of summons and the court instructed counsel to submit briefs on that issue. On May 14, 1973, appellants herein filed a brief on behalf of the State of Ohio, a copy of which appears at Appendix Y, pages 11-12.

On May 10, 1973, a hearing was conducted in the Allen County Common Pleas Court in *State of Ohio v. Smith* 73 CR 098, at which time both Smith and Hatfield refused to produce the films, named in the subpena duces tecum, pleading the Fifth Amendment. Thereupon, the State of Ohio presented independent evidence to show that Smith and Hatfield were, in fact, in possession of the described films at the time of service of process. The Common Pleas Court held both in contempt and ordered them incarcerated for a period of ten days in the Allen County Jail, or for such lesser time as was necessary to make them produce the films, and on May 11, 1973, journalized the contempt citations against Smith and Hatfield in 73 CR 098, copies of which appear herein at Appendix Z, pages 3-6.

On May 11, 1973, a petition for a writ of habeas corpus was filed in the Federal District Court on behalf of Smith and Hatfield in C 73-187. Upon the filing of the petition, the Federal District Court issued an order releasing Smith and

Hatfield from the Allen County Jail, a copy of which order appears herein at Appendix Z, page 7. On May 11, 1973, the order was served on the Sheriff of Allen County, who accordingly released Smith and Hatfield. On May 14, 1973, appellants herein were instructed by telephone by the Federal District Court of the content of the petition, the content of which appears at Appendix Z, pages 8-9, and that there would be a hearing on the petition for writ of habeas corpus at 2:00 P.M. on May 16, 1973.

Appellants filed a Notice of Appeal in *Pursue Ltd. v. Huffman et al* on May 14, 1973.

On May 16, 1973, appellant Fair filed an answer in C 73-187 and "Memorandum In Support of Right of Law Enforcement to require the production of films alleged to be obscene, copies of which appear herein at Appendix Z, pages 10-15.

The Articles of Incorporation on file in the office of the Secretary of State of the State of Delaware show Pursue, Ltd. to be a Delaware corporation which began its corporate existence in that State on December 6, 1972, five days after Pursue, Ltd. filed its action in *Pursue, Ltd. v. Huffman, et al.*, C 72-432, in the Federal District Court of the Northern District of Ohio, Western Division, and also shows that the only director of the appellee corporation on that date and until the first annual meeting of the stockholders, or until a successor was elected and qualified, was Robert E. Smith, whose business address is listed in said Articles of Incorporation as Suite 2005, 100 Colony Square, Atlanta, Georgia, 30309, which address is the same as that of Gilbert H. Deitsch, the counsel for record for William H. Dakota, the defendant in the Allen County Common Pleas Court and the assignor of the lease under which Pursue, Ltd. claims. Pursue Ltd., Director Robert E. Smith is also known to practice law with Gilbert H. Deitsch at the same address, Suite 2005, 100 Colony Square, Atlanta, Georgia. A copy of said Articles of Incorporation appears at Appendix AA, pages 3 to 6.

A copy of the application for license applied for by Robert L. Hollis of Pursue Ltd. on file in the Allen County

Court appears at Appendix AA, page 7. A copy of the lease for the premises at 69 Public Square endorsed with the assignment thereof, appears at Appendix AA, pages 8 to 18.

A copy of the state court docket in *State of Ohio ex rel Lawrence S. Huffman*, 72 CIV 0326, appears at Appendix AA, pages 19-22.

A copy of the federal court docket in *William Dakota v. Edward Fair et al.*, 72 C384 appears at Appendix AA, page 23.

A copy of the federal court docket in *Pursue Ltd. v. Huffman et al.*, 72 C432 appears at Appendix AA, pages 24-25.

A copy of the federal court docket in *William Dakota v. Huffman* 72 C445, appears at Appendix AA, page 26.

A copy of the federal court docket in *William Dakota v. Huffman*, 73 C176, appears at Appendix AA, page 27.

Appellants petitioned this Court for a Writ of Mandate or Prohibition in *Huffman et al v. The United States District Court for The Northern District of Ohio, Western Division et al*, No. 72-1613, which matter was docketed on June 1, 1973, and is presently pending before this Court. An application to Justice Potter Stewart for a Stay Order or Writ of Injunction was denied on June 12, 1973.

THE QUESTIONS ARE SUBSTANTIAL

Appellants contend that the interference of the United States District Court for the Northern District of Ohio, Western Division, in the civil and criminal matters hereinabove recited, is an abuse of the federal process and disregards this Court's recent decisions on federal interference in criminal matters in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (Feb. 23, 1971); *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (Feb. 23, 1971); *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (Feb. 23, 1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (Feb. 23, 1971); *Dyson v. Stein*, 401 U.S.

200, 91 S.Ct. 769, 27 L.Ed.2d 781 (Feb. 23, 1971) and *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (Feb. 23, 1971), as further explicated for civil proceedings in *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S. Ct.__. As a direct result of such federal interference, the Cinema I Theatre at 69 Public Square, in Lima, Ohio, has been able to avoid the application of civil and criminal statutes, both substantive and procedural, and has thwarted the administration of due process of law in the State of Ohio for a period of more than a year.

The state procedures on enforcement of final judgments and appellate practice have been interferred with. Under Ohio Rules, the appellate process begins with the entry of a final judgment in the trial court, a fait accompli herein. To commence an appeal, a notice of appeal must be filed within 30 days after the entry of the final judgment. Ohio Rules of Appellate Procedure, rule 4(A) *Pursue, Ltd.* has elected not to appeal the state court judgment and the fact findings made by the trial court regarding the property interests *under which they claim* herein. Accordingly, under Ohio law, that final judgment represents the law of the case. *Independent of the question of the legal correctness of the federal court interference*, fact findings (2) and (3) of the Allen County Common Pleas Court, regarding the status of property at 69 Public Square, reading:

> "(2) That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing.
>
> (3) That this conduct and the continuous exhibition of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01 (c) of the Revised Ohio Code; . . . ."

which were not affected by such federal court interference, *are entitled to recognition.* But how shall the State of Ohio proceed to execute that portion of the final judgment which is not now subject to attack, so as to apply Ohio justice to the case of a declared violation of the law? Or for that matter, how may the State of Ohio perfect its trial court victory in such litigation, ie., the valid findings of the state court re the existence of a public nuisance, in either the state or the federal appellate systems? Where Pursue, Ltd. has refused to appeal from the final judgment of the Common Pleas Court, may petitioners do so in the state court? Clearly not, for the findings there were favorable! Further, on an appeal within the federal system, how may the State of Ohio preserve the Common Pleas Court's factual findings re the existence of a public nuisance, where the three-judge Federal District Court refused to consider such evidentiary matters in their disposition of the case!

The problem herein is *not* the same problem encountered in *Byrne v. Karalexis*, 396 U.S. 976, 24 L.Ed.2d 447, 90 S.Ct. 469 (Dec. 15, 1969), which this Court faced and solved by granting a stay of the temporary injunction issued by the United States District Court for the District of Massachusetts pending the timely filing and disposition of an appeal. The distinguishing factor in *Byrne v. Karalexis, supra*, can be seen from Justice Douglas statement of facts in his dissent at page 486:

> "Mr. Justice Douglas, dissenting.
>
> "Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass Gen Laws, c 272, § 28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege

> scienter. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.
>
> "Respondents were convicted of the state obscenity offense on November 12, 1969. The applicant in this proceeding, the District Attorney for Suffolk County, has not agreed that respondents may exhibit the film pending the appeal of their convictions. On November 19, 1969, applicant moved the District Court to abstain from deciding the constitutionality of the Massachusetts statute, pending the resolution of that issue in the state courts. On November 28, 1969, the District Court, by a 2-1 vote, denied the motion and authorized a temporary injunction enjoining applicant from interfering with respondents as respect future showings of the film, "I Am Curious (Yellow)," pending a final disposition by the merits.
>
> "Applicant now requests this court to stay the temporary injunction which was issued by the District Court. *"The injunction issued by the District Court does not interfere in any way with the criminal conviction already obtained in the Massachusetts courts. That case will proceed unaffected by anything the federal court does, save for final execution of the state judgment. Dombrowski v. Pfister*, 380 US 479, 14 L Ed 2d 22, 85 S Ct 1116, is different. There we did not force petitioners to risk vindication of their constitutional rights in a state prosecution under an "overly broad" state statute. Id., at 486, 14 L Ed 2d at 28. But in this case that risk was faced and resolution of the constitutional issues is being undertaken in the state courts. All that the fedderal court proposes is protection of respondents against repeated prosecutions, while both the state courts and

federal courts are resolving the constitutional issues. Enjoining one state prosecution, though perhaps permissible under Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441, *would not be in keeping with more recent decisions. Douglas v. Jeannette*, 319 US 157, 87 L Ed 1324, 63 S Ct 877. But I read the sparse record before us differently from Mr. Justice Stewart and believe that we deal here with threats of repeated prosecutions; and those threats seem to me to be no less ominous to the federal constitutional regime than the threatened harassment of union leaders in *Hague v. CIO*, 307 US 496, 83 L Ed 1423, 59 S Ct 954, who were asserting First Amendment rights in explaining the purposes of the new National Labor Relations Act. See the opinion of Mr. Justice Roberts and Mr. Justice Black, id., at 504-506, 83 L Ed at 1430, 1431. *"There may in time be a collision between the two systems for us to resolve. Meanwhile I would let the two orderly processes go ahead. For I can imagine no better and smoother accommodation of the needs of the two regimes than that designed by the District Court.* (our emphasis.)

See also Justice Black's concurring opinion at page 489:

"In this case a Federal District Court *stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case.* One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the State." (our emphasis)

By interfering with the final judgment herein, the three-judge Federal District Court has effectively "Stayed" the appellate proceedings in controvention of the policy expressed in 28 U.S.C. Section 2283, and has prevented the development of even Justice Douglas' "concurrent jurisdiction to collision." There is and can be no parallel appeal taking place within the state system. It would appear that the "collision" upon which Justice Douglas reflected, has already come to pass herein.[2] Under the laws enacted by the Ohio Legislature and the decisions rendered thereon by the Ohio judiciary, petitioners have a duty, and are about to enforce the final judgment of the Common Pleas Court of Allen County, Ohio, of November 30, 1972, as to which no appeal was perfected, which requires that the Cinema I Theatre be closed as a public nuisance, being a disorderly house which regularly exhibits obscene motion picture films as a course of conduct. Section 3767.05 defines that duty as follows:

> ". . . if the existence of a nuisance is established on the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from *further maintaining the nuisance. . . .*" (Our emphasis)

Section 3767.06 also provides, in part, as follows:

> ". . . if such innocence is established, such unsold personal property and contents shall be delivered to the owner, *otherwise it shall be sold*, as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; *and for closing the place and keeping it closed*, a reasonable sum shall be allowed by the court. . . ." (Our emphasis)

In carrying out those duties, appellants are placed upon the horns of a dilemma in that they are faced with the possibility of being held in contempt of the federal order of judgment herein which, if followed by appellants, would require them to be guilty of nonfeasance in the performance of their duties as state law enforcement officers.

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[2] See Chief Judge J. R. Brown's letter of Mar. 19, 1973, to Federal District Judge S. C. Pointer Jr. re this new problem at Appendix AA, pages 36-37.

I

PURSUE LTD. HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COURT HAS ORIGINAL JURISDICTION

(A) THE CONGRESSIONAL PURPOSE IN PASSING THE CIVIL RIGHTS ACT OF 1871 (42 USC SECT. 1983 AND 1985) WAS TO PREVENT RACIAL DISCRIMINATION. IT WAS THE INTENT OF CONGRESS AT THAT TIME THAT THOSE SECTIONS SHOULD NOT BE INTERPRETED AS A GENERAL FEDERAL TORT LAW AUTHORIZING INTERFERENCE WITH WHAT TRADITIONALLY, ARE MATTERS FOR THE STATE COURTS. A PUBLIC NUISANCE LAWSUIT, BROUGHT BY A COUNTY PROSECUTOR, IS A CLASSIC EXAMPLE OF A LAWSUIT BELONGING TO THE LATTER GENRE OF CASES.

To make the Federal District Court a trial court for every case in which a pornographer raises a "free speech" defense reaches a result never intended by Congress when it enacted the 1871 Civil Rights legislation.

On the issue of whether Pursue Ltd. stated a cause of action under 42 USC Sect. 1985(3) (see page M-4), this court cannot avoid the implications of its rationale in *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed.2d 338, 91 S. Ct. 1790 (June 7, 1971), where, in upholding federal jurisdiction under the conspiracy section of the Civil Rights Act of 1871 in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, (43 USC Sect. 1985) Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that *it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspirators' actions, at page 348:*

"It is thus evident that all indicators - text, companion provisions, the legislative history - point unwaveringly to

1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, *they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'* Id. at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - *by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.* See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100,29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, *means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.* The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Our emphasis)

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC Sect. 1985; (2) *the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871.* In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section 1983, and remarked at page 345:

"Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation *as a whole* (Sections 1983 and 1985) and noted

at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into section 1983(3) would thus deprive that section of all independent effect. . . .Given the existence of these three provisions, it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them...*" (our emphasis)

It seems logical that if Sections 1985 and 1983 are to be read together and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus" then certainly the reach of Section 1983 is not so broad as to justify making the federal district courts the proper forum to litigate public nuisance lawsuits, lacking in racial or class based invidious discriminatory animus, wherein, as here a frivolous *defense* of "free speech" is raised.

This Court's ruling in *Mitchum v. Foster, supra*, does not hold that 42 U.S.C. Sect. 1983 embraces a civil rights action of the sort pleaded herein, i.e., against state officials for state action taken to abate as a public nuisance a business dealing in obscenity as a regular course of conduct. All that case decided was that the three-judge court below erred in its prefatory ruling in the abstract that the injunctive relief sought was unavailable since 28 U.S.C. Sect. 1983, under which that lawsuit was brought, was not an Act of Congress within the "expressly authorized" exception of the anti-injunction statute which would authorize a federal court to grant injunctive relief and stay proceedings in a state court. Nor did this Court consider in *Mitchum, supra*, whether the plaintiff in that action, did, in fact, state a cause of action under 42 U.S.C. Sect. 1983. See *Farrell v. Joel, Jr.*, 437 F.2d 160 (2nd Circuit, January 20, 1971), a civil rights case based upon 42 U.S.C. Sect. 1983 to review school administration practice, where Circuit Judge Feinberg, speaking for the 2nd

Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that his complaint states a viable action under the Civil Rights Act, 42 U.S.C. Sect. 1983, and its jurisdictional counterpart 28 U.S.C. Sect. 1343(3). *It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption . . . .*" (Our emphasis.)

When this Court does undertake to decide this basic question, it must weigh in the balance this Court's past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past three terms of court, which culminated in its rulings restricting federal interference in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 288, 26 L.Ed.2d 234, 90 S.Ct. 1739 (June 8, 1970), during the 1969 October Term and in *Younger v. Harris, supra; Samuels v. Mackell, supra; Boyle v. Landry, supra; Perez v. Ledesma, supra; Dyson v. Stein, supra; and Byrne v. Karalexis, supra*, during the 1970 October Term. Appellants herein submit that any expansion of federal jurisdiction along the lines undertaken by the United States District Court for the Northern District of Ohio, Western Division, herein, will bring further chaos to obscenity litigation, will severely damage the state-federal court balance, and will further load this Court's docket.

(B) ASSUMING THAT, IN THEORY, A CAUSE OF ACTION CAN BE STATED UNDER 42 U.S.C. SECT. 1983 OF THE CIVIL RIGHTS ACT, BASED UPON LEGAL ACTION TAKEN BY A COUNTY PROSECUTOR TO ABATE A PLACE AND CONDUCT WHICH AMOUNTS TO A PUBLIC NUISANCE, STILL THE FACTS ALLEGED IN *PURSUE, LTD. v HUFFMAN*, C72-432, ON THEIR FACE, FAIL TO PLEAD SUCH A CAUSE OF ACTION AND FOR THAT REASON ALONE THE DISTRICT COURT SHOULD HAVE DISMISSED THE CASE.

(1) Highly specific facts must be pleaded in the complaint.

It is often said that in an action under Section 1983, the plaintiff must allege highly specific facts. It is not enough to state conclusory allegations without support of the facts alleged. Complaints have been dismissed where the allegations were broad, conclusory and unsupported by factual allegations. Federal Civil Rights Acts by C. J. Antieau, section 83 at page 108. Common sense dictates that in a case such as this, where the state court complaint is highly specific as to the nature of the conduct complained against, see point V (C), infra, that a federal complaint alleging violations of sections 1983 and 1985 must reply to the questioned conduct with equal specificity, in order to avoid a motion to dismiss.

(2) In examining the sufficiency of the Federal Complaint, the court below erred in failing to consider appellee's course of conduct which was alleged and proved in the State court trial.

The federal district court erred, in its ruling as to whether a cause of action had been stated, in failing to take into account the fact that the state trial involved the trial court's examination of appellee's course of conduct extending over several months, and its examination of 16 motion picture films which had been exhibited at the theatre during that period of time, which films such court ruled were obscene under specific state standards as to what the term "obscene" legally encompassed. Paralleling the question as to whether a three-judge court should be impaneled and the jurisdictional requirement that a substantial federal question be raised as to the constitutionality of the state statute, *Idlewild Bon Voyage Liquor Corp. v. Epstein* 370 U.S. 713, 8LEd. 2d. 794, 796, 82 S.Ct. 1294 (June 25, 1962), (infra, at page 43) is the question for the trial court as to whether the constitutional question posed has application to the situation

under litigation. In other words, a court will not litigate legal rights in the abstract. *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (Feb. 29, 1960). The *Raines* case concerned an action by the United States against members of the Board of Registrars and others of Terrell County, Georgia, under the Civil Rights Act of 1957, 42 U.S.C., § 1971. The United States District Court held 42 U.S.C. § 1971 (c) unconstitutional and dismissed the complaint. In reversing that court, the Supreme Court (Justice Brennan speaking for seven members, Frankfurter and Harlan concurring) held at page 529 that this Court, as is the case with all federal courts:

> ". . . 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of the litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .' Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . . ."

II

(A) THE COMPLAINT HEREIN FAILED TO SUPPLY A BASIS FOR EQUITABLE JURISDICTION AND FEDERAL INTERVENTION.

The equitable principles which govern interference by federal courts in criminal and civil proceedings pending in state courts were laid down by this Court in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (Feb. 23, 1971),

and *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. ____ (June 19, 1972).

In *Younger v. Harris, supra*, this Court established the equitable principles which are to govern interference by federal courts in pending *criminal* matters. There it was held that it would take "exceptional circumstances" to warrant a federal court's enjoining state proceedings where a state prosecution was already pending at the time the federal action was filed; that in general, the plaintiff *must allege and prove* not only "irreparable injury," the traditional prerequisite for injunctive relief, but in addition, that the danger of irreparable injury is both "great and immediate," which normally requires that plaintiff show bad faith and an intention to harrass on the part of the prosecuting officials, as was established by the pleadings in *Dombrowski v. Pfister, 380* U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); further, that where the prosecution is undertaken in good faith, and not for purposes of harrassment, a federal court may not properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridged First Amendment rights, absent "extraordinary circumstances." In *Samuels v. Mackell*, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764 (Feb. 23, 1971), those same standards were adopted where the federal relief sought in such situations was the issuance of a declaratory judgment.

In *Mitchum v. Foster, supra*, this Court was faced with a fact situation involving abatement proceedings brought under the civil law, - similar to the proceedings herein. While that decision dealt with a collateral issue, the majority opinion did observe that the above equitable principles regulating interference in criminal cases expressed in *Younger, supra*, also restrained interference by a federal court in civil cases pending in state courts, at page 718.

> ". . . we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris . . . ."

The facts as pleaded in the complaint show: (1) That the statute under which the civil action was brought had been upheld, *pro tanto*, against a broad attack on the statute, by a three-judge Federal District Court in the same district wherein the federal relief was sought, *Grove Press, Inc. v. Flask*, 326 F. Supp 574 (Mar. 10, 1970), vacated and remanded on other grounds in *Grove Press, Inc. v. Flask* ___ U.S. ____(June 21, 1973) and (2) that the civil action was brought by petitioner as the prosecuting attorney for Allen County under the compulsion of O.R.C. Section 3767.03, and (3) that the judgments of the state trial court on the issue of "public nuisance" were favorable to the petitioner in the hearings on both the preliminary injunction, entered October 24, 1972, and on the final injunction, entered November 30, 1972, both of which determinations were alleged on the face of the complaint. Appellants submit that a finding that the pleadings herein raised issues of "bad faith" and "harrassment" would be reversible error.

The inescapable conclusion to be drawn from the principles expressed in *Younger* and *Mitchum* and the complaint on file herein is that a case for federal relief by way of equitable interference could only be made out by urging that two elements of proof are capable of being established: (1) That the statute on its face abridges First Amendment rights, and (2) that "extraordinary circumstances" exist; yet neither are present. The alternate proof of "danger of irreparable injury being great and immediate" is unavailable where, from the facts pleaded in the complaint it must be held, as a matter of law, that petitioners acted in good faith and not for purposes of harrassment.

An examination of O.R.C. Section 3767 et seq show it to be constitutional on its face. *Grove Press, Inc. v. Flask, supra*, A civil statute requiring a forfeiture for a period of one year of the leasehold interest in the property used in conducting or maintaining a public nuisance, as a civil penalty, after trial on the merits and a finding by the trial court that a public nusiance exists, is entirely constitutional. *U.S. v. U.S. Coin and Currency. One Lot of Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232, 34 L.Ed.2d 438, 93 S.Ct. 489

(Dec. 11, 1972). See Point VI (A) at page 61 entitled "The error in the federal court's logic.

Though not considered by the federal court in its decision, the proof before the federal court demolished all claims of "extraordinary circumstances"; i.e., as noted in the three-judge Federal District Court's opinion (Appendix A, page 10), the state trial court's finding of a public nuisance in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was based upon an examination of 16 motion picture films by the Allen County Common Pleas Court, the obscene nature of which was specially pleaded and apparent upon the face of the complaint on file in the state court, which pleadings had been removed to the federal court on December 11, 1972. Further, the federal court had before it evidence in the form of affidavits appended to the trial brief filed on January 16, 1973 (see Statement of Facts, page 16 and Appendix N, pages 3-11) and appended to the Motion to Dismiss filed on February 12, 1973 (see Statement of Facts, page 19 and Appendix P, pages 2-39, Appendix Q, pages 2-41, and Appendix R, pages 3-51) which established, as a matter of law, that *Pursue, Ltd.* was still maintaining the public nuisance at the time of the federal court hearing on March 12, 1973.

Further, in its prayer for equitable relief, Pursue Ltd. is challenged by the ancient maxim of equity that a "man must come into a court of equity with clean hands." *Eyre, C.B. Dearing v. Earl of Winchelsea* (1787); Cox Eq. 318, 319. On this matter Federal District Judge Cox, speaking for the three-judge court (2-1) in *Irene McGrew, et al. v. City of Jackson, Mississippi*, 307 F. Supp. 754 (Dec. 31, 1969), said the following at page 765:

> "None of these plaintiffs have any standing in this court under the clean hands doctrine to successfully seek a recovery of that film. *[10]*"

At footnote 10 of Judge Cox's opinion are cited excerpts from one Supreme Court decision and two Circuit Court of Appeals decision:

> "10. Precision Instrument Mfg. Co. et al. v. Automotive Machinery Co., 65 S.Ct. 993 provides:

> " 'The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughren v. Loughren, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 7 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.)§§ 397-399. This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor. Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants, this doctrine assumes even wider and more significant proportions. For if an equity court

properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 492-494, 788 (sic), 62 S. Ct. 402, 405, 406, 86 L.Ed. 363.

"To the same effect is Karl E. Stiegele and Speidel Corp. vs. J. M. Moore Import-Export Co., Inc., (2CA) 312 F.2d 588.

"New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc. (5CA) 291 F.2d 471, the court said:

> " 'Without considering the legal issues on the merits, we affirm the judgment of the trial court. We do so by application of the age-old, but sometimes overlooked, doctrine that "he who comes into equity must come with clean hands.' "

"Earle R. Hanson & Associates v. Farmers Cooperative Creamery Company of Clear Lake, Wisconsin, (8CA) 403 F.2d 65, provides:

> " 'The misconduct need not be of such a nature as to be actually fraudulent or constitute a basis for legal action. The plaintiff may be denied relief where his conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others. Johnson v. Freberg, 178 Minn. 594, 228 N.W. 159, 160 (1929). Cf Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); Pope Mfg. Co. v. Gormully & Jeffrey Mfg. Co., 144 U.S. 224, 236-237 12 S.Ct. 643, 36 L.Ed. 426 (1892); Kool Vent Metal Awning Corp. of America v. Bottom, 205 F.2d 209 (8 Cir. 1953).' "

For the above reasons the complaint in *Pursue, Ltd. v. Huffman*, C72-432, fails to state a cause of action upon which

equitable relief may be granted. See Memorandum in Support of Motions to Dismiss and Dissolve Temporary Restraining Order at Appendix O, pages 4-7; Appendix P, pages 1-39; Appendix Q, pages 1-41; and Appendix R, pages 1-51; and Complaint in *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota*, 72 CIV 0326, at Appendix C, pages 3-13.

(1) The Three-Judge Court was improperly invoked.

By order dated December 11, 1972, the Sixth Circuit Court of Appeals designated a three-judge district court to consider the constitutional claims of Pursue, Ltd. (See Appendix L, pages 18-19.) In that designation, the Court of Appeals stated:

> "This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This is a matter best determined by the three-judge court. . . ."

Under this Court's rulings in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 8 L.Ed.2d 794, 796, 82 S.Ct. 1294 (June 25, 1962), the case should have been dismissed by the three-judge court for failure to raise a substantial federal question.

The constitutionality of O.R.C. Sections 3767 et seq. depends upon a pragmatic assessment of its operation in the particular circumstances. In *Kingsley Books, Inc v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct.1325 (June 24,1957) this Court in dealing with a like situation held at page 1474:

> "The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance. . . .' The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties. 'What is needed,' writes Professor Paul A. Freund, *'is a pragmatic assessment of its operation*

in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 - 354 U.S. 441, 442 (emphasis added.)" Appellant submits that where specific pleadings demonstrate on their face that a party is dealing in obscenity per se, it is plain error to rule that a substantial federal question is raised for the invocation of a three-judge court. See *Paris Adult Theater v. Slaton*, No. 71-1051, slip opinion at page 6; *Kaplan v. California*, No. 71-1422, slip opinion at page 7; *Womack v. U.S.* 294Fd. 204 Jan. 12, 1961), cert denied in 365 U.S. 859, 81 S.Ct. 826, 5L.Ed. 2d 822 (Mar. 27, 1961). See also Point I (B) 2, supra, at page 36 and *Miller v. Reddin*, 293 F Supp. 216, at 229 (Nov. 18, 1968) wherein Federal District Judge Hauk, after examining the materials there involved, held that jurisdiction did not lie in a three-judge court, the court saying:

"As such, each of the five books is clearly, unequivacally and uncontrovertibly obscene and pornographic in the hard core sense, and reasonably comes within the ambit and purview of the obscenity statute. . . "Thus it is impossible for the court to find any substantial federal question. . . ."

III

UNDER THE DOCTRINE OF LIS PENDENS, PURSUE LTD. LACKED STANDING TO PROSECUTE THE CIVIL RIGHTS ACTION ALLEGED IN *PURSUE LTD. V. HUFFMAN ET AL 72C432.*

On November 17, 1972, the date that Pursue, Ltd. acquired from William Dakota its leasehold interest in Cinema I at 69 Public Square, Lima, Ohio, a civil proceedings *in rem* to determine the status of property at that address (whether it was a public nuisance) entitled, *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was on file in Allen County Common

Pleas Court and all parties in that action had been served (see Statement of Facts, pages 7-9). The complaint described by metes and bounds and by street address said premises and named the owners thereof (Appendix C, pages 4-5). Actual notice of such state lawsuit was given to Pursue, Ltd. on November 22, 1972, through service on Robert Hollis, the president of Pursue, Ltd. (see Statement of Facts at page 12, and application for license at Appendix AA). Further, Pursue, Ltd. was formed as a corporation by the attorneys for William Dakota in the state action for what would appear to be the specific purpose of taking an assignment of the property from Dakota in an attempt to avoid the consequences flowing from the adverse state court ruling (see Statement of Facts, page 25, and Articles of Incorporation for Pursue, Ltd. at Appendix AA, pages 3 to 6). Pursue, Ltd. had actual knowledge of the final judgment of November 30, 1972, in the state court action, forfeiting the leasehold interest (for a year) of William Dakota, Pursue, Ltd.'s, Assignor, prior to its filing of the federal action, having alleged that fact in its complaint (see Appendix J, at page 7).

In order that there may be a valid and effective *lis pendens*, four elements must be present: (1) The property must be of a character to be subject to the rule; (2) the Court must have jurisdiction both of the person and the *res*; (3) the property or *res* involved must be sufficiently described in the pleadings; and (4) the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

The Ohio Statute on *lis pendens*, O.R.C. Section 2703.26, provides that when summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title. This statute is simply declaratory of the Common Law doctrine of *lis pendens*, and is to be construed with reference to the Common Law rules in respect of the doctrine. 34 Ohio Jurisprudence 2d, Lis Pendens, page 685. In interpreting this statute, the Ohio Supreme Court has indicated that the doctrine is not based, or at least does not rest primarily, on any doctrine of notice, but rests upon

public policy and necessity. In other words, it may be said that the doctrine rests upon the power the court acquires over the property in *litis pendence*, and cannot have its functions frustrated by dealings *inter parties* with the *res* during litigation. Suits might be interminable, and judgments without fruits, if one litigant could impose upon an opposing litigant the necessity of making new parties as often as he chose to convey property involved in the suit. 34 Ohio Jurisprudence 2d, Lis Pendens, page 687. While the general rule is that a judgment or decree binds only parties and those in privity with them, and is not conclusive as against strangers to the action, yet, according to the doctrine of *lis pendens*, one who acquires an interest in property which is at that time involved in litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interests are acquired takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset. This is so irrespective of whether he has been made a party to the proceedings, or had actual notice of the pendency of the proceeding, and even where there was no possibility of his having had notice of the pendency of the litigation. 34 Ohio Jurisprudence 2d Lis Pendens, page 684.

Under the Statement of Facts, noted above, and the doctrine of *lis pendens*, the final judgment of the Allen County Common Pleas Court in *Ohio ex rel Huffman v. William Dakota*, 72 CIV 0326, on November 30, 1972, forfeiting the leasehold interest of William Dakota, operated to divest Pursue, Ltd. of such interest in the property.

IV

UNDER THE MANDITORY PROVISIONS OF 28 USC SECTION 2283, THE U. S. DISTRICT COURT LACKED JURISDICTION TO ENJOIN THE PROCEEDINGS IN THE STATE COURT.

(A) THE FEDERAL COURT LACKED JURISDICTION OVER THE REAL ESTATE WHICH, AT THAT TIME, WAS IN CUSTODIA LEX IN THE STATE COURT PROCEEDINGS.

The federal court lacked jurisdiction over the subject real estate which at that time was in *custodia lex* in the state court *in rem* proceedings in *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326. The federal court failed to recognize that the state court civil action brought under Ohio Revised Code, Section 3767 *et seq.* was both an *in personam* and an *in rem* action[3] - *in personam*, in so far as the defendants, who were before the court, might be enjoined by the court's rulings, and *in rem*, in that the status of the property was also to be determined by the court. In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), Justice Frankfurter stated the principle as:

> "Third. This brings us to applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L.Ed. 470, holds that the court, whether federal or state, which first takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L.Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L.Ed. 749. See Kline v. Burke Construction Co., 260 U.S. 226, 235, 43 S.Ct. 79, 83, 67 L.Ed. 226, 24 ALR 1077: 'The rank and authority of the (federal and state) courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring

[3] See, however, the court's remarks on "standing" at footnote 1 (Appendix A, page 5).

jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' "

See also *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189 (1935), and *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), and the cases cited therein. See also the historical discussion of *Toucey v. New York Life Ins. Co., supra*, in *Mitchum v. Foster, supra*, at 714.

". . . The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC Sect. 2283. . . to 'restore the basic law as generally understood and interpreted prior to the Toucey decision. . .' "

The infirmities noted above, being apparent on the face of the complaint as filed, the federal court should have dismissed the federal action for lack of jurisdiction.

(B) A FEDERAL COURT HAS NO POWER TO INTERFERE WITH STATE APPELLATE PROCEEDINGS. IT MAY NOT STAY PROCEEDINGS IN A STATE COURT AFTER A FINAL JUDGMENT HAS BEEN ENTERED IN THE STATE ACTION.

Appellants know of no authority which permits the removal of a state case after final judgment. To countenance that procedure would interfere with the state appellate processes which commence upon the entry of the final judgment. On this point, see also the personal letter of Chief Judge John R. Brown of the Fifth Circuit Court of Appeals, dated Mar 19, 1973, to Federal District Judge Sam Pointer Jr., regarding the propriety of federal interference after a final judgment in an Alabama motion picture theatre abatement case, identical to the case herein, wherein three theatres were abated as public nuisances (See Appendix AA, page 36). A copy of the

final decree and writ of injunction in one of those cases entitled *State of Alabama ex rel Sweeton v. First Amendment Foundation Inc. et al*, in the Circuit Court of Madison County, dated Feb. 23, 1973, appears at Appendix AA, pages 28-31. The opinion and order of Federal District Judge Sam Pointer Jr. in the Alabama cases appears at Appendix AA, pages 32-35. Appellants would point out that Judge Pointer's decision recognized the distinction between the "in personam" and "in rem" aspects of the Alabama Public Nuisance Statute and State judgment in the abatement action, discussed hereinafter at Point VI and permitted the state "in rem" closure order to stand undisturbed.

(1) Jurisdiction over the real estate could only be acquired by removing the entire Common Pleas action to the Federal District Court. Such is not authorized by the removal statutes.

To acquire jurisdiction of the *res* under the circumstances herein prevailing, it would have been necessary to remove the entire state action to the federal court in a removal action authorized by 28 USC Sect. 1441 or 1443. The removal action in *State of Ohio ex rel Huffman v. Dakota*, however, was not filed until Dec. 11, 1972, at which time the Allen County Common Pleas Court had already handed down its final judgment of Nov. 30, 1972 on the matter.

On Nov. 30, 1972, the Allen County Common Pleas Court entered a permanent injunction in State of Ohio ex rel *Huffman v. Dakota*, C72-0326, (see page 13 and Appendix I, pages 2-4). On Dec. 11, 1972, Robert Hollis, President of Pursue Ltd., as successor to the interest of William Dakota, filed a petition for removal in the federal district court entitled *Dakota v. State of Ohio ex rel. Huffman*, C-73-176, (see page 15 and Appendix L, pages 3-12), effecting its removal from the state court. On April 26, 1973, respondent three judge federal district court, sua sponte, entered an order of judgment, dismissing the case as moot (see page 21 and Appendix S page 3).

The case was improperly removed: The federal court did not have removal jurisdiction to act upon the case, and the case should be remanded. See Appendix L at pages 10-14.

A civil action to abate a public nuisance is not a "civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution etc. . . .", as that phrase is employed in 28 USC sect. 1441(b), so as to satisfy the test for removal jurisdiction. Quite the contrary, the public nuisance cause of action is one in which state courts traditionally have original jurisdiction, and is founded upon a claim arising under the sovereign power of the state to safeguard state interests. *Grove Press Inc. v. City of Philadelphia* 300 F Supp 281 at 292. The fact that a first amendment claim may be raised in defense thereto does not satisfy the requirements of the removal statute. *Gully v. First National Bank*, 299 US 109 (Nov. 9, 1936)

Appellees arguments that they, as film exhibitors, cannot enforce their first amendment rights as citizens of the United States to freedom of speech and the press in the Court of Common Pleas of Allen County, Ohio and thus qualify for removal jurisdiction under 28 USC sect. 1443(1) is answered in *Georgia v. Rachel* 384 US 780, 791 (1966):

> ". . . the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443 . . . "

V

THE OHIO OBSCENITY STATUTE, AS CONSTRUED BY THE OHIO JUDICIARY, AND AS APPLIED BY THE TRIAL JUDGE, COMPLIES WITH THE SPECIFICITY REQUIREMENT ENUNCIATED BY THIS COURT IN *MILLER V. CALIFORNIA* DECIDED JUNE 21, 1973.

The Allen County nuisance abatement action in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326 was filed on Sept. 18, 1972. Long before that time, the Ohio judiciary had construed the obscenity laws of the State of Ohio in a manner which rendered the word "obscene", specific. See *City of Youngstown, Ohio v. De Loreto*, 251 N.E.2d 491 at 500, 48 Ohio Op. 2d 393 (Sept. 10, 1969); State of Ohio ex *rel. Ewing v. Without a Stitch*, 57 Ohio Op. 2d 184 at the footnote on page 187 (July 9, 1971); and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 141, 142, 27 Ohio St. 2d 278 (July 21, 1971).

Further, the Ohio legislature had already enacted specific legislation (effective Sept. 15, 1970) of the type which was exemplified by this court in *California v. Miller*___*U.S.*____ LEd.2d__ 93 S.Ct. 2607 (June 21, 1973), and which this court wrote into the federal statutes as a federal standard in *U.S. v. 12-200 ft. Reels of Super 8MM Film* ___U.S. _____ LEd.2d ____, 93 S.Ct. 2665.

(A) The Ohio Judiciary, Through Decisional Law, Has Engrafted Specific Standards Onto the Term "Obscene" as Used in the Ohio Obscenity Laws.

The common standards of right and wrong embodied in the criminal statutes of Ohio dealing with sexual morality have, by judicial construction, been subsumed in the term "obscene" as used in the obscenity statutes. If such depictions are accompanied with the same "mens rea" which defines an offense under the criminal statutes, such also is in violation of the specific standards prescribed by the term

"obscene". In *De Loreto, supra*, the Court in examining several sex magazines on appeal, enumerated the state statutes and city ordinances which prohibited immoral conduct. From that the Court deduced what the moral standards of Ohio people on sex were, at page 500:

> *"The moral standards of the people in Ohio on sex are readily ascertainable because of the statutes that have been enacted on the subject. Youngstown has similar ordinances to the statutes of the state of Ohio.*

OHIO LAWS INDICATING SEX MORAL STANDARDS

"Laws of Ohio and the city of Youngstown relating to sex, which indicated the moral standards of the people of Ohio, prohibit the following:

"1. Adultery or fornication. Section 2905.08, Revised Code. Youngstown City Ordinance 132.03.

"2. Prostitution. Sections 2905.14 and 2905-27, Revised Code. Youngstown City Ordinance Sections 132.01, 132.04 and 132.06.

"3. Any person eighteen years of age or over wilfully making an indecent exposure of his person in a place or in a place where there are other persons to be offended or annoyed thereby, or solicit another to engage in an act of sex perversion. Section 2905.30, Revised Code. Youngstown City Ordinance 132.11.

"4. Any person eighteen years of age or over wilfully exposing his or her private parts in the presence of two or more persons of the opposite sex. "Private Parts" means the external genitalia of the human body. Section 2905.31, Revised Code.

"5. Sodomy, Section 2905.44, Revised Code.

MORAL STANDARDS OF OHIO PEOPLE ON SEX

"Thus, the laws of Ohio and the City of Youngstown prohibit extra-marital sexual relations, as offensive to the moral standards of the people of Ohio. Nudity to the extent of exposing the external genitalia of a male or female human body is also prohibited as likely to incite or encourage extra-marital sexual relations.

"We hold that one of the purposes of Section 2905.34, Revised Code, and of Youngstown City Ordinance Section 132.09(a), is directed at obscene publications that are likely to incite or encourage sexual conduct contrary to the moral standards of the people of Ohio." (Our emphasis.)

Hamilton County Common Pleas Judge Leis, in his trial court opinion in *Ohio ex rel. Keating v. Vixen*, dated November 17, 1969, applied the same rationale in his evaluation of the contemporary standards of the community. See Appellants' Statement as to Jurisdiction in *"A Motion Picture Film Entitled "Vixen" et al v. State of Ohio, ex rel Keating*, No. 71-599 at page 13a.

"The Court, under its prerogative to believe or disbelieve, or accept all or part, or none of the testimony and evidence presented, is of the opinion that such testimony does not reflect the true feeling and acceptability by the community of 'Vixen' type of film. First of all, acceptability by an audience is not the true criteria of the measurement of the community standard, and acceptance of a film by the community, because the attending audience is but a segment of the community, and I might say a very small segment of the Community.

"A proper criteria for evaluation of the contemporary standard of the community is its establishment and enforcement of laws governing the conduct of its citizenry. A simple reference in the Ohio Revised Code sets forth the moral standards of the people of Ohio, including this community, on sex matters. These laws are enforced in this community, and include:

Adultery or Fornication - Section 2905.08 O.R.C.

Prostitution - Section 2905.10 O.R.C.

Indecent Exposure - Section 2905.30 O.R.C.

Solicitation of Unnatural Sex Act - Section 2905.30

O.R.C.

Nudism - Section 2905.31 O.R.C.

Incest - Section 2905.07 O.R.C.

Rape - Section 2905.01 (etc.) O.R.C.

Sodomy - Section 2905.44 O.R.C.

"*These laws as well as local ordinances set forth the moral standard of the community*, and under proper presentation, they are enforced.

"In the case of *Trans Lux Distributing Corp. v. Board of Regents* (248 NYS 2d 857), Judge Burke states 'It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street.'

"The community does not allow, or condone, fornication on the street corner, or any public display of nakedness. Bare bosom women are not permitted to walk the streets. If this happens, prosecution follows. *If the community does not accept (and permit) public display of sex acts and nakedness on its streets and in public places, can it be said that a movie displaying such conduct meets the standards of the community? Definitely not.*" (Our emphasis.)

Lucas County Common Pleas Judge Nicholas J. Walinski arrived at the same result in his Findings of Fact and Conclusions of Law handed down in *State of Ohio ex rel. Ewing v. Without A Stitch*, on September 15, 1970.

"Finding of Fact . . .

"10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. *The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally* attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.R.C., Indecent Exposure
Sec. 2905.30 O.R.C., Soliciation of Unnatural Sex Act
Sec. 2905.31 O.R.C., Nudism
Sec. 2905.44 O.R.C., Sodomy

There are existing similar statutes in the majority of states, giving an inference of national community standards." (Our emphasis.)

In affirming the decision of Judge Walinski, the Court of Appeals of Lucas County noted in *State ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971):

"*We have also considered as indicative but not conclusive of national standards of laws of the State of Ohio* and other states.* See Roth, 354 U.S. at page 485."

As a footnote to that portion of the Court's opinion, the following appeared:

*"*Among the laws of Ohio which are indicative are the following. See Section 2905.34, Revised Code. Its pertinent parts are as follows:* . . .

"This statute was effective September 15, 1970, after the filing of the complaint, but before the decision of the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:

"Section 2905.08 Revised Code - Adultery or Fornication: Section 2905.10, Revised Code - Inducing illicit

intercourse; Section 2905.26, Revised Code - Prostitution, lewdness and assignation defined: Section 2905.30, Revised Code - Indecent exposure: Section 2905.31, Revised Code - Nudism; Section 2905.44, Revised Code - Sodomy." (Our emphasis.)

The Ohio Supreme Court in its opinion in *State ex rel. Keating V. Vixen*, 27 Ohio St. 2d 278, 272 N.E.2d 137 (July 21, 1971)[4] removed all doubt that the above decisional law represented an authoritative interpretation of the word "obscene" in the State of Ohio, at page 140:

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.

"Since the real issue before this court is whether the injunction should be dissolved, or continued in force and effect, R. C. § § 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the

[4] On June 25, 1973, this Court entered the following order in *A Motion Picture Film Entitled "Vixen" v. State of Ohio, ex rel. Keating* ____ U.S. ____, ____ L.Ed2 ____, ____ 93 S.Ct. ____ (June 25, 1973):

"The motion of appellants to strike appellees supplemental brief in No. 71-599 is denied. The judgment(s) is vacated and the case remanded for further consideration in light of *Miller v. California*, ____ U.S. ____ (1973); *Paris Adult Theatre I v. Slaton*, ____ U.S. ____ (1973); *Kaplan v. California*, ____ U.S. ____ (1973); *U.S. v. 12 200-ft. Reels of Super 8 mm. Film*, ____ U.S. ____ (1973); *U.S. v. Orito*, ____ U.S. ____ (1973); *Heller v. N.Y.*, ____ U.S. ____ (1973); *Roaden v. Ky.* ____ U.S. ____ (1973); and *Alexander v. Virginia*, ____ U.S. ____ (1973); Mr. Justice Douglas would reverse the judgment(s). See *Miller v. California, ante* (dissenting opinion of Justice Douglas). Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall would vacate the judgment(s) and remand the case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I v. Slaton, ante*. See *Miller v. California, ante* (dissenting opinion of Justice (Brennan)."

A petition for rehearing was filed by State of Ohio ex rel. Keating on July 20, 1973.

injunction granted below.

"Those two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that: 'No person, with knowledge of the content and character of the * * * motion picture * * * involved, shall * * * present such motion picture * * * before an audience which contains a series of display * * * of * * * sexual intercourse * * * the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is * * * for commercial exploitation. * * * (Italicized words supplied.) So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.' *Schneider v. State* (1939), 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

"Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial explitation rather than for a genuine, scientific, educational sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that 'Vixen' does depict numerous acts of purported sexual intercourse, and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. (Our emphasis.) * * *

"Therefore, where scenes in a motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R. C. § § 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. § 3767.01, and their exhibition may be enjoined as provided in R.C. § 3767.02 et seq." (Our emphasis).

"It is an ancient maxim of the law that 'legis interpretatio legis vim obtinet'; that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law, by becoming, as it were, a part of the statute itself. The importance of adhering to this rule is seen in the fact that the judicial explanation of an

obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. 'The court almost always, in deciding any question, creates a moral power above itself.' " Black on Interpretation of Laws, Second Editon at page 616.

(B) Ohio Revised Code Section 2905.34, Which was Effective at the Time the State Abatement Action was Tried in the Allen County Common Pleas Court, Provided Specific Standards of the Type Exemplified by This Court in California v. Miller.[5]

Ohio Revised Code Section 2905.34 reads as follows:

R.C. 2905.34:

As used in Sections 2903.13 to 2903.16, inclusive, and Sections 2905.34 and 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

1. Its dominant appeal is to prurient interest;
2. Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
3. Its dominate tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence cruelty, or brutality;
4. It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest. when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

(C) Appellant, in the State Nuisance Abatement Complaint, pleaded specific violations of specific state standards. The trial court final judgment found such allegations to be true.

In accordance with the appellate decisions in City of *Youngstown v. DeLoreto, supra; State of Ohio ex rel Ewing v. "Without A Stitch", supra, and State of Ohio ex rel Keating v. Vixen, supra*, appellant herein pleaded specifically the violation of specific state standards at paragraph 10 of his plead-

[5] Note, in particular, O.R.C. Section 2905.34A (2) and (4) and the reference in those sections to "sexual conduct" as that term is defined in Section 2905.34 (D).

ings.[5] (See Appendix C-9 and 10, infra). Allen County Common Pleas Judge Light, in his final judgment of Nov. 10, 1972, found such allegations to be true. (See Appendix I-2, Infra).

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[5] "10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance as that term is defined in Section 3767.01 (C) of the Ohio Revised Code, which reads in part as follows:

"Section 3767.01 Definitions

As used in all sections of the Revised Code relating to nuisances:
(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists, or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

VI

SECTIONS 3767.04 AND 3767.06 OF THE OHIO REVISED CODE ARE CONSTITUTIONAL ON THEIR FACE.

(A) THE ERROR IN THE FEDERAL COURT'S LOGIC.

The federal court below, in riveting its attention on the prior restraint "in personam" implications of *Near v. Minnesota* 283 US 697, 75 L.Ed 1357, 51 S.Ct. 625, completely lost sight of the fact that the Ohio Legislature had undertaken in O.R.C. sections 3767 et seq. to provide what, unquestionably, is an "in rem" and not an "in personam" remedy. The "in personam" provisions which troubled the federal court are not an essential part of the statutory scheme and should have been disregarded by that Court under the paramount rule of statutory construction which requires a Court to ascertain and, where possible, to give effect to the intent and

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APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 16; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14; fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

purpose of the legislature, as expressed in the statute. 82 C.J.S. Statutes, page 560. Compare the order and judgment of Federal District Judge Sam Pointer in the Alabama case, referred to at Point IV (B), page 48, a copy of which appears herein at Appendix AA, pages 32-35.

Instead of according the state lawsuit its historical treatment as one which involved the *status* of real property and a determination of whether or not the "res" constituted a public nuisance from which certain statutory penalties flowed, namely the forfeiture of the leasehold interest in such property (a legal equivalent of "loss of use for a year") and the forfeiture of the personal property used therein - an approach which presented absolutely no constitutional questions, see *U.S. v. U.S. Coin and Currency*, 401 US 715, 28 L.Ed 2, 434, 91 S.Ct. 1041 (Apr 5, 1971), *One Lot of Emerald Cut Stones and One Ring v. U. S.* ____U.S. ____, LEd.2d ____,S.Ct. (Dec.____, 1972) - the court for some reason felt constrained to focus its attention on particular language of the statute which, when viewed by itself and apart from the general statutory scheme might, as an in personam restriction against an individual, be questioned under the *Near v. Minnesota, supra*, prior restraint doctrine.

Appellants herein submit that the error in the logic of the federal district court's opinion (Appendix A pages 3-12) is the result of faulty deductive reasoning, which proceeded somewhat as follows:

Major Premise: To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under *Near v. Minnesota, supra,* (see A-11)

Minor Premise: The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films. (see A-4,A-10, A-11)

Conclusion: The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 are unconstitutional.

The syllogism formed by the above three propositions is inaccurate for the facts in the minor premise have been used

falsely, not having been given in their actual setting of experience, but abstractly from a larger whole of circumstances. See Legal Reasoning and Briefing, by Brumbaugh, copyright 1917 by the Bobbs-Merrill Co. at page 56:

> "The situation is different if the answer or plea be one in confession and avoidance. Logically considered, *the admission or confession is not that the two premises are legally connected, but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out*, and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts - now we perceive that it demands also that all of such facts be correctly reported. *Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances.* Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of completeness against which an answer Confession and Avoidance is directed.
>
> "*The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that it no longer expresses any cause of action against the defendant, or one of a different import and effect.* In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged

in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in obeyance until the latter question upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

"In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but *it does a very unique thing - it invokes a wider rule of law within which the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead - and thus it challenges the right of the plaintiff to put the special set of facts in issue*. Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser - the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise." (our emphasis)

On the above matter, consider the following second syllogism:

Major Premise: Under the ancient doctrine of deodand expressed in *U.S. v. U. S. Coin and Currency, supra*, and *One Lot of Emerald Cut Stones and One Ring v. U.S. supra*, where a place is determined in a legal proceedings to be

operating as a public nuisance involving contraband, a penalty may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period of up to one year.

Minor Premise: The Ohio Public Nuisance Statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films thru forfeiture of the leasehold (use of the premises) as a penalty.

Conclusion: The Ohio Public Nuisance statute O.R.C. sections 3767.04 and 3767.06 are constitutional.

(B) HISTORICAL BACKGROUND

Consider the following hypothetical situation: Suppose that, over a period of several months, Jurisdiction "A" filed a succession of seven different criminal complaints against an activity, alleging that on each of those seven occasions two obscene motion picture films were exhibited, and that the obscenity laws had been violated by such conduct at that address. Suppose further, that, after each criminal charge a criminal trial had taken place and the defendant had been found guilty as charged. Can there be any doubt that, under general principles of law and without benefit of statute, a district attorney in that jurisdiction could successfully state a civil cause of action, alleging that the repeated and continuing illegal conduct at that address constituted a public nuisance which should be abated? Is there any doubt that an equity court could make a finding that such repeated illegal conduct at that address constituted a public nuisance and, upon a further finding that such condition *was continuing and presently existed*, could authorize that the same be closed as a public nuisance? Further, is there any doubt that, having found the public nuisance to be *presently in being*, the equity court could lay down the conditions upon which the activty might remain in operation, one of which could be that the errant party show to the satisfaction of the court that the public nuisance no longer existed? See *Crain v. State*, 3 Ind. 193 (1851); Perkins on Criminal Law, Foundation Press, 1954; *Bloss v. Paris Township*, 157 N.W.

2d 260 (Apr. 1, 1968); Joyce, Law of Nuisances, Sect. 7, page 15; *Cactus Corporation d.b.a. The Apache Drive-in Theatre v. State of Arizona ex rel Murphy, City Attorney of Tuscon*, 480 P.2d 375 (Feb. 9, 1971); *Evans Theatre Corp. et al v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (Mar. 4, 1971), cert. den. Nov. 7, 1971, in 404 U.S. 950, 30 L.Ed.2d 267, 92 S.Ct. 281; *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, cited with approval in *California v. Lim*, 18 Cal.2d 872.

Add an additional factor for a new hypothetical. Suppose that in the above Jurisdiction "A", the legal process for getting criminal matters to trial and for getting such criminal matters to trial and for getting such criminal trials finalized has been rendered inoperative for any of a number of reasons, may Jurisdiction "A" make an end around run on the criminal trial pitfall and select, in the first instance, as the primary law enforcement tool, the civil action to abate a public nuisance, alleging and proving in that single trial a course of continuing conduct by establishing as evidence the acts which comprise the seven alleged criminal violations, and asking that the law of forfeitures in connection with public nuisances be applied?

To ask the above rhetorical questions is to supply the obvious answers. The power of the state court in such matters is clear. In *Kingsley Book, Inc. v. Brown*, 354 U.S. 436, Justice Frankfurter, writing for the majority court, supplied the following answer at page 441:

> "We need not linger over the suggestion that something can be drawn out of the due process clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this court thus to limit the state in resorting to various weapons in the armory of the law. *Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action*, or by an injunction or by some or all of these remedies in combination *is a matter within the legislature's range of choice (citation).* If New York chooses to subject persons who disseminate obscene

> 'literature' to criminal prosecution *and also to treat with such books as deodands of old, or both*, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. . . ." (our emphasis.)

The terms "qui tam action" and "deodand", referred to by Justice Frankfurter, are defined in Black's Law Dictionary, Revised, 4th Editon, as:

> "QUI TAM. Lat. 'Who as well .' An action brought by an informer under a statute *which establishes a penalty for the commission or omission of a certain act*, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action'; because the plaintiff states that he sues as well for the state as for himself. See In Re Barker, 56 Vt. 14; Grover v. Morris, 73 N.Y. 478." (our emphasis.)

> "DEODAND (L.Lat. DEO dandum, a thing to be given to God) in English law. *Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the Crown* to be applied to pious uses, and distributed in alms by the High Almoner. 1 Hale, P.C. 419; Fleta, Lib 1, C25; 1 Bl. Comm. 300; 2 Steth. Comm. 365. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, LRA 1916F, 935." (our Emphasis)

When the authors of the Ohio Public Nuisance Statute first sat down, over 50 years ago, to draft new legislation on this ancient problem, they were thinking of the laws of forfeiture and deodand when they pondered new solutions in this area of public nuisance, to compensate for certain inadequacies of the criminal law.

Ohio Revised Code, Section 3767 et seq. providing for abatement of public nuisances and certain forfeitures in connection therewith, had its derivation at a time in our history when lewdness of a different type was plaguing the Nation.

The procedural problems however, were quite similar. See 20 Columbia Law Review, at 604, which traces the history of such litigation:

> " 'RED LIGHT' INJUNCTION AND ABATEMENT ACTS' – *The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' laws for the abatement of disorderly houses.* Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment *to the inadequacy of criminal prosecutions;* and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalities for contempt.
>
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . ." (our emphasis.)

The historical development of this type of statute has been in three directions: (1) Some states, like Missouri, use language which is clearly limited to houses of prostitution (M.R.S. Section 563.120); (2) other states, like California, have used statutory language like "Prostitution, assignation and lewdness" in which, by judicial decision, the term "lewdness" has been given a broad meaning. See *People v. Bayside Land Co.*, 48 Cal App. 257, 191 P. 944, where the word "lewdness" in Penal Code Sect. 11225, was given broad significance so as to include all other immoral or degenerate conduct or conversation between persons of opposite sexes and was held not limited to "assignation" and "prostitution." See also the dissent of Justice Herndon in *Harmer v. Tonylyn Productions Inc.*, 100 Cal. Rptr 576, 577-583 (Mar 2, 1972) and *People ex rel Hicks v. "Sarong Gal"* 103 Cal. Rptr 414 (Aug 3, 1972) (3) other states, like Ohio and Louisiana have

adopted amendments which specifically includes placeswhere obscenity is exhibited (O.R.C., Section 3767.01).

(C) OPERATION OF OHIO REVISED CODE, SECTIONS 3767 ET SEQ.

1. General

In Ohio, where the statutory language defining "nuisance" specifically encompasses a place where obscene films are exhibited, the operation of the statute in general is quite simple. Its constitutionality as applied to one motion picture film "I Am Curious (Yellow)" was challenged and upheld by a three-judge court in *Grove Press, Inc. v. Flask*, 326 F.Supp. 574 (Mar. 10, 1970) (Celebrezze, Green, Batiste) see *Grove Press Inc. v. Flask* ____*U.S.* ___ , ____ L.Ed.2d ___, ___S.Ct. (June 25, 1973) vacated and remanded for further recomsider in light of *Miller v. California*____U.S. ___June 21, 1972. While the *Flask* decision is now questioned by the three-judge court herein, where it attacks the operation of the statute at page 7:

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film. . . .",

that objection is not well taken, as explained hereinafter. In the first place, the theatre cannot be shut down unless the trial judge is convinced from the evidence that the public nuisance is *continuing* and *presently exists.* If for example, the public nuisance was found to exist solely on the basis of "I Am Curious (Yellow)" and such showing was not representative of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

This does not say, however, that the exhibition of one

film alone cannot under the statute, be the proper basis for a judicial closing of a theatre for a year as a public nuisance. Take for example the hypothetical case of the Pussy Cat Theatre in Hollywood, California which regularly exhibits so-called "Adult Films", which any reasonable person would regard as being of the prosecutable variety. Suppose that on December 1, 1972, the Pussy Cat Theatre commences the public exhibition of a nationally known controversial 62 minute film showing nothing but oral copulation of the male penis in the mouth of a female (which act when publicly performed in California is a felony). The movie ad page advertising the film for December 1, 1972, is as shown on adjoining page 71 and describes the film only as "It". Thereafter criminal charges are filed, but nine months later that matter has not yet come to trial for a number of procedural reasons, such as attacks on the right to procure a copy for trial by subpoena or search warrant, etc. The news ad 5 months later on Apr. 20, 1973, is as shown on adjoining page 72 and reads "How Long? We will continue to show 'Deep Throat' until you no longer care to see it." Nine months later on August 10 , 1973 it is as shown on adjoining page 73. Does this Court have any serious doubt that a district attorney has an inherent right, independent of statute, as a representative of government to bring a *civil* action to abate the film itself as a public nuisance and, where the film is exhibited after the action is filed, and is still being shown when the trial judge finds that the same is a public nuisance, to require that the theatre be padlocked for a year.

The difference in the results reached in the "I Am Curious (Yellow)" and "Deep Throat" examples referred to above is obvious. To state a general rule which must follow from either hypothetical, as indulged in by the three-judge court herein is to fail to recognize the rule expressed by this court in *U.S. v. Raines, supra*, at a time when it should be applied. Does the "Deep Throat" fact situation noted above, affect the straw man constructed by the federal court reading:

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre

ADULT MOVIES ADULT MOVIES ADULT MOVIES ADULT MOVIES
TOPAR THEATRES
THIS IS THE FILM TO SEE!
The Devil in Miss Jones
PUSSYCAT THEATRES
CLOSEST OF KIN
BEDROOM BEDLAM
OVEREXPOSURE
CINEMA
CINE I & II
"LOVE OFFICE STY"
VENICE
THE SAHARA
WE ARE OPEN
THE ONE AND ONLY DEEP THROAT
PUSSYCAT-684-5742
DYNAMITE
STUDIO THEATRE
ADULT MOVIES
ADULT LIVE SHOW
CORONET
LIVE GIRLS
STRIPPERS TOTAL ACTION
"HOLLYWOOD — PASSION CITY"
FILM FESTIVAL
GRAND HOTEL

Merlin Will Blend Humor With Health
LUCKY MOVIEGOER!
Malcolm McDowell Lindsay Anderson's O LUCKY MAN!
BADGE 373
ADULT MOVIES ADULT MOVIES ADULT MOVIES ADULT MOVIES
The Devil in Miss Jones
BROTHER & SISTER
THEY DO THE STRANGEST THINGS!
ROOM 11
Xanadu
3 HOUR SHOW
"TEENAGE LOVE"
The Touch of Flesh
TOTAL GIRL SHOWCASE
LIVE GIRLS ON STAGE!
CORONET
Just Arrived
Kim Comes Home
DEEP THROAT ...IS IT!
PUSSYCAT-684-5742
SKUNK
SEXUAL AWARENESS
ADULT MOVIES
BURLESK ARENA

> can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film. . . ."?

Certainly, if the Federal District Court had considered the "Deep Throat" hypothetical and the subject matter therein involved, it would have had to restudy its hypothesis. The rule that a statute may be constitutional as applied to one set of facts, whereas it would be unconstitutional as applied to another set of facts is so well known as not to require citation of authority. During arguments on Mar 12, 1973, the three-judge court paid lip service to that rule:

> "THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that--well, the question before us is if that was a constitutional section there, we still would also reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T. page 19, lines 16-22.),

In the case herein, the Federal District Court's failure to apply that rule was error. See Memorandum in Support of Motion to Dismiss in *Pursue, Ltd. v. Huffman* (Appendix O, pages 4-7) and (Appendices P, Q and R).

2. Ohio Revised Code Section 3767.04

The action is commenced by the filing of a verified petition. R.C. Section 3767.04. Where the filing is by a citizen, a bond in the sum of not less than $500.00 is required to secure the payment of damages if such action is wrongfully brought. R.C. Section 3767.03. Upon the filing of the complaint, several discretions or options are given to the person upon whose relation the state action was brought, and to the trial judge, which if exercised, may result in other options (and also mandates). The person *may* or *may not* apply for a temporary injunction. If he does, the judge *must* grant a hearing within 10 days after the filing of the petition. Where the

complaining party, *in his discretion, decides* to apply for a preliminary injunction, *he may also, in his own discretion,* apply for an ex parte restraining order to prevent the personal property and contents of the place from being removed until the court's ruling on the preliminary injunction. Where such application is made, the judge has a discretion and *may* or *may not* grant such restraining order. See R.C. Section 3767.04, which provides, in part, as follows: (see Appendix B, page 5)

> "After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within 10 days after the filing. Where such application for a temporary injunction is made, the court or judge thereof, may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. . . ."

The use of the term 'may' and 'shall' in the above context is quite clear. In the interpretation or construction of statutes, the primary and paramount rule is to ascertain, declare, and give effect to the intention of the Legislature if it is possible to do so. 50 Ohio Jur. 2d, Statutes, at page 139. In this connection see Black on Interpretation of Laws, 2nd Ed., at page 531, et seq.:

> "The words 'may,' 'authorized,' 'shall,' 'must,' and the like, as employed in statutes, are first of all to be presumed to have been used in their natural and ordinary sense, and they will be so understood unless such a construction would be obviously repugnant to the intention of the legislature, or would lead to some inconvenience or absurdity. It has sometimes been loosely said that 'may' and 'shall,'

as used in statutes are interchangeable terms. But this is not correct. To convert such terms, the one into the other, at the mere will of the court, would be little short of substantive legislation. It is true that this may be done where it is imperatively necessary to prevent an irreparable mischief or an invasion of vested rights, and where the public interest or the fixed rights of individuals are concerned. But otherwise it is not permissible to put a forced or strained construction upon words of this character, to elevate merely permissive words into the force of a command, or to soften imperative expressions into a mere grant of license or authority.

"Taken in its natural and ordinary sense, the word 'may' does not import a command, but merely signifies permission, ability, or possibility, and generally it denotes that the action spoken of is optional with the person concerned, or rests in the discretion of the court or body to which license or permission is given. And the word always retains this primary meaning unless a different construction is necessary to give effect to the clear purpose and intention of the legislature, to make the statute accord with settled public policy, or to save the rights of parties in interest. For example, in a statute providing that whoever is found in a state of intoxication in a public place may be arrested without a warrant by a police officer, the language is permissive. It gives authority to the officers named to use their discretion in regard to making the arrest, considering all the circumstances of the particular case, but does not require them at all hazards to arrest such a person. But the word 'may' should be taken as equivalent to 'must' in all cases where it is evident that the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. And it is well settled that 'may,' in any statute, is to be construed as equivalent to 'shall' or 'must' when the public

interests or rights are concerned, and when the public or third persons have a right de jure to claim that the power granted should be exercised.

"On the other hand, 'shall' and 'must' are words of command. Taken in their usual and proper meaning, they leave no room for choice or discretion, but are imperative; and they will be presumed to have been used in this sense, unless something in the character of the statute or the subject to which it relates, or in the context, shows that this could not have been the intention of the legislature."

The ex parte restraining order authorized by Section 3767.04, *if applied for* at the time of filing the application for a preliminary injunction, and *if issued* by the trial court, does not amount to a prior restraint of free speech. See *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970); *U.S. v. Little Beaver Theatre, Inc.*, 324 F. Supp. 120, 121 (Jan. 15, 1971); *Go v. Peterson*, 480 P.2d 35, 36 (Feb. 1, 1971), *Walter v. Slaton*, 182 S.E.2d 464, 467 (May 13, 1971). Nor was it established for anything related to that purpose. The Legislature, in specifically authorizing the court to bring such contents within the court's jurisdiction, did so for the purpose of assuring that the special provisions established by the Legislature might be given effect, i.e., so that the forfeiture established by Section 3767.01(C) (which declared all such personal property and contents to be a nuisance) might be effective in carrying out the summary remedy afforded by Section 3767.06 (which provides for the sale of such personal property) and Section 3767.11 (which provides that the "proceeds of the sale of the personal property . . .shall be applied in payment of the costs of the action and abatement including the complainant's costs . . . .")

The third paragraph of Section 3767.04 sets forth in clear language what must follow where the complaining party establishes the right of the state to relief at the hearing on the preliminary injunction. That paragraph provides that the injunction *shall issue without additional bond* (a grant of authority which is uncommon in temporary injunction cases.

See 29 O. Jur.2d, Injunctions §126 Bond or Other Security, at page 419). That paragraph provides, in part:

> "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge *shall issue a temporary injunction without additional bond* restraining the defendant and any other person from continuing the nuisance. . . ." (Our emphasis.)

See Black on Interpretation of the Law, supra, as to the meaning of "shall".

The temporary injunction, authorized by O.R.C. Sect. 3767.04, operates in a dual capacity: both against the person of the defendants who are before the court, and against the property (the res), which is also before the court; (by posting a copy of the order on the premises). The "in personam" aspect is not an essential part of what is clearly an "in rem" statutory scheme, and should have been disregarded by the federal district court under the paramount rule of statutory construction which requires a court to give effect to the intent and purpose of the legislature. At the very least, the court should have taken the route followed by Federal District Judge Sam Pointer which would have permitted the state courts to hear an appeal and give definition to the statute. (See Appendix AA pages 32-35.)

In the next sentence of the same section, the Legislature accorded summary relief to the state against the real estate. Where the complainant at such hearing on the preliminary injunction establishes the fact of a public nuisance and the right of the state to a preliminary injunction, the court *is mandated thereby* to issue an *order closing the place against its use for* any purpose of lewdness until final decision is rendered on the application for a permanent injunction *unless "the person owning, in control or in charge of the nuisance so enjoined shows to the satisfaction of the court or judge that the nuisance complained of is abated."* The language of the statute is:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and *unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated*, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Revised Code, the court or judge *shall forthwith issue an order closing the place against its use for any* purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. . . ." (our emphasis)

Under the above closure provision, *the leasehold interest* where such public nuisance is conducted or maintained and *the personal property* and contents located and used *therein are to be forfeited* until final decision is rendered on the application for a permanent injunction *unless either of two conditions is shown to exist, namely:* (1) That the person "owning, in control, or in charge of the nuisance so enjoined. . ." *affirmatively* "shows to the satisfaction of the court. . . that the nuisance complained of is abated," or (2) That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by O.R.C. section 3767.10 and has regained possession of the premises.

O.R.C. section 3767.04 further allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction and regain possession of such real property by fulfilling three requirements; namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until decision by the court on the application for a permanent injunction and (3) Satisfying the court of his good faith. The statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two require-

ments, namely (1) Payment of all costs incurred, and (2) Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

At the time of the trial judge's ruling in the Common Pleas court below, it was clear, beyond doubt, that absolute judicial restriction at this point of the proceeding - after trial on the merits - was entirely proper. The right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial decision" referred to by this court in administrative prior restraint cases such as, *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed2d 809 (June 22, 1964); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965), and *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed.2d 966, 88 S. Ct. 754 (Jan. 29, 1968), had reference to a speedy determination *by a trial court* as distinguished from a prior restraint applied in administrative proceedings. If the language and reference of this court in *Teitel Film* at page 969 to "prompt final judicial decision by the trial court":

> ". . . The Chicago censorship procedures violate these standards in two respects. . . (2) the absence of any provision for a *prompt judicial decision by the trial court* violates the standard that. . .the procedure must also assure a prompt final judicial decision . . . ." (our emphasis.)

was not clear, that issue was laid to rest in *Interstate Circuit Inc. v. Dallas* 390 U.S. 676, 20 L.Ed 2d225, at 235, fn22, 88 S.Ct. 1298 decided on Apr. 22, 1968 of the same term of court.

> "22. Appellants also assert that the city ordinance violates the teachings of *Freedman v. Maryland, supra, because it does not secure prompt state appellate reveiw. The assurance of a 'prompt final judicial decision'* (380 U.S. at 59, 13 L.Ed.2d at 655) *is made here, we think, by the guarantee of a speedy determination in the trial court* (in this case nine days after the Board's classification). *see Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed. 2d 966, 88 S.Ct. 754. . . ." (our Emphasis.)

The *Interstate Circuit* decision gives a crystal clear understanding of what this court meant in *Freedman* by "prompt, final judicial decision." The court is *not* making an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the *Interstate Circuit* case. See the Jurisdictional Question and Arguments of Appellant Interstate Circuit in their brief on the merits at pages 3, 20 and 21. See also *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S. Ct. 1400, 28 L.Ed.2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints by way of court order for a reasonable period of time in advance of a final determination of the obscenity issue by the *trial court* in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the *preliminary injunction* stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B) (2), the Ohio Trial Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

After the decision went against Cinema I Theatre and William Dakota in the trial court and the preliminary injunction was issued, the losing litigants had an option as operators and "the person owning, in control, or in charge of the nuisance so enjoined". They could have shown "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court was not required to close the place against its use for the "lewdness" which had been found to exist. It seems clear to appellants herein that, in a fact situation where the only nuisance involved would be one particular film, had testimonial evidence been given by the person "in control or in charge of the nuisance" that the same had been terminated, a proper ruling would have been such as was handed down by the trial court in ***Bertrand De Blanc v. Courville***, Docket No. 46743-1/2,

15th Judicial District Court, LaFayette Parish, La., which abated the film, "The Minx," under a similar Louisiana statute. That court held as follows:

> "It is further ordered that the rule of the District Attorney be made absolute and accordingly that the writ of injunction issued be perpetuated and that the building known as Center Cinema Theatre and the contents thereof, to-wit, the motion picture film known as The Minx are declared to be a nuisance and that the defendants, Ogden Perry Theatre, Inc., and Jules J. Courville, be and they are enjoined and restrained from committing and permitting further acts of obscenity as defined by RS 14:106, including the showing of the motion picture film The Minx in said building.
>
> "It is further ordered that an order of abatement be issued ordering the effectual closing of the building and the premises housing said building and prohibiting its use for any purpose for a period of one year from the date of the filing of this suit *unless all costs of these proceedings be paid and a bond be furnished in accordance with the law and approved by the court.*
>
> "It is further ordered in compliance with the statute that the said defendants be permanently enjoined and restrained from carrying on and conducting such a nuisance anywhere in the State of Louisiana. . . ." (our emphasis.)

That the construction given this type of abatement statute by the LaFayette, Louisiana, trial court is a reasonable interpretation, see 20 Columbia Law Review at page 608, commenting on the intent behind such abatement statutes as originally drafted:

> "Fundamentally this legislation is preventive and not penal. For although the order for abatement prescribes the closing of the premises and the sale of the personality found therein, nevertheless the premises and property are almost invariably subject to release upon the payment of costs by the owner and upon filing of sufficient security to insure good behavior. In reality the injunction and abatement together merely serve to bind the defendant over to keep the peace. . . ."

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were that the operator had exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to accept the testimonial evidence offered by such operator as meeting his burden of proof, i.e., "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony would be to perpetuate a fraud on the court. See also page 70.

3. Ohio Revised Code Section 3767.06

Under O.R.C. Section 3767.06, the Common Pleas Trial Court's final judgment of Nov. 30, 1972 does not foreclose the errant litigants from acquiring the right of reentry and repossession. The court order read "is ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio." (Appendix I page 4). The trial court was following Section 3767.06 which provides the following mode of relief:

> "3767.06. Content of judgment and order. If the existence of a nuisance is admitted or established in an action as provided in Sections 3767.01 to 3767.11, inclusive, of the Revised Code. . . an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as pro-

vided in Section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in Section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year *unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in Section 3767.04 of the Revised Code."* (our emphasis.)

Section 3767.06 operates to allow the owner of any real property so restricted to reenter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and (3) Satisfying the court of his good faith. It also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements, namely, (1) Payment of all costs incurred, and (2) Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

4. Statutory Construction

Petitioners submit that under rudimentary principles of constitutional law, respondent is limited in its attack on the constitutionality of the statute to the specific manner in

which it was applied in this case. They cannot complain that in the future it may be unconstitutionally applied to others. See *United States v. Raines*, 362 U.S. 17, 21 (1960):

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

A broad attack on the Ohio Nuisance Statute, similar to that made by respondent herein, was made and rejected by a three-judge federal district court in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970). Vacated and remanded on other grounds in ___ U.S. ___ (June 21, 1973). The public policy which prevented Grove Press's broad attack should also defeat appellee's broad attack, which comes from the opposite end of the spectrum.

The construction given to the statute by the three-judge court below failed to take into consideration the fact that O.R.C. Section 3767, et seq., is a statute involving the public welfare. In the latter case, courts have always applied a liberal construction in favor of the public and a strict construction against those whose interests are adverse thereto. See 50 Ohio Jr.2d, Public Welfare, Section 24, at page 226:

> "Section 241. *Public Welfare* - It is a well established doctrine that every public statute has, or is supposed to have, as its objective some purpose or policy whereby the public welfare is served. The Legislature will be presumed to have enacted laws for the public good, and, therefore, where there is a strong interest relating to the public good or general welfare designed to be conserved by the statute, the courts, in interpreting it, apply a liberal construction in favor of the public and a strict construction against those whose interests are averse thereto. Indeed, it has been declared that in our form of government the only excuse for legislative enactment is that it will serve the public. Accordingly, in the interpretation of an ambiguous statute, a construction should be favored which is 'safe to the state' and the citizens

thereof. Where a reasonable interpretation can be given to it which will make it operate for the welfare of the general public, as distinguished from the welfare of certain individuals, groups, or classes of individuals, the courts, in construing a statute, will not impute to the legislature the unworthy purpose of having intended to enact a law for the benefit of certain individuals, groups, or classes of individuals, as distinguished from the public. . . ."

Appellants herein would ask the rhetorical question: "Of what significant difference is it, in reference to the intent of the Legislature or the public good, that only one obscene film should be played in a particular theatre for nine weeks (or indefinitely) by its pandering owners and not nine of such films for each of nine consecutive weeks?" (See, also, remarks at page 70).

Seizure and destruction or confiscation of the instruments of ascertaining wrongdoing expresses a resort to a legal remedy sanctioned by the long history of Anglo-Saxon law. *Ohio ex rel Bell v. Mahoning Valley Distributing Agency, Inc.*, 169 N.E.2d 48, at 66, affirmed in 186 N.E.2d 631, at 632; *Wisconsin v. Voshart*, 159 N.E.2d 1, 8 (June 7, 1968); Modern Constitutional Law, Antineau, Vol. 1, at Sec. 3.9. *One Lot of Emerald Cut Stones and One Ring v. U.S.* 409 U.S. 232, 34 L.Ed.2d. 438, 93 S.Ct. 489, (Dec. 11, 1972.)

The views of this Court on the seizure of obscene materials as contraband and their forfeiture as such are clearly stated in *U.S. v. Reidel*, 402 U.S. 351, 28 L.Ed. 2d 813, 91 S.Ct. 1410 (May 3, 1971), and *U.S. v. Thirty-seven (37) Photographs*, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971). The decisions in *Reidel* and *Thirty-seven (37) Photographs* reaffirm the principles stated above in *Kingsley Book, Inc. v. Brown supra.*

The view of this Court on forfeitures of property used in illegal activities is set forth in *U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041, decided on April 5, 1971. In that case, Justice Harlan writing for a majority of five, stated at page 438:

"If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different meaning. Cf. Morissette v. United States, 342 US 246 96 L Ed 288, 72 S Ct 240 (1952). *However, as our past decisions have recognized, centuries of history support the Government's claim that forfeiture statutes similar to this one have an extraordinarily broad scope.* See Goldsmith-Grant Co. v. United States, 254 US 505, 65 L Ed 376, 41 S Ct 189 (1921); United States v. One Ford Coupe, 272 US 321, 71 L Ed 279, 47 S Ct. 154, 47 ALR 1025 (1926). Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. See Dobbins's Distillery v. United States, 96 US 395, 399-401, 24 LEd 637, 638 (1878); The Palmyra, 12 Wheat 1, 14, 6 L Ed 531, 535 (1827). Simply put, the theory has been that if the object is 'guilty,' it should be held forfeit. In the words of a medieval English writer, 'Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.' The modern forfeiture statutes are the direct descendants of this heritage, which is searchingly considered by Mr. Justice Holmes in a brilliant chapter in his book, The Common Law. The forfeiture action in the present case was instituted as an in rem proceeding in which the money itself is the formal respondent. . . ." (our emphasis.)

See also *One Lot of Emerald Cut Stones* and *One Ring v. U.S.* 409 U.S. 232, 34 L.Ed.2d. 438, 93 S.Ct. 489 (Dec. 11, 1972) where this Court said at p. 442:

"If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments. "Congress may impose both

a criminal and a civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense." *Helvering v. Mitchell*, supra, 303 US, at 399 82 L.Ed. 443, 63 S.Ct. 379 (1943)."

and at page 443:

(10, 11) "The § 1497 forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigating and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. See *Helvering v. Mitchell, supra*, 303 US at 401, 82 L.Ed. 917 *Marcus v. Hess, supra*, 317 US, at 549-550, 87 L.Ed. 443, *Rex Trailer Co. v. United States*, 350 US 148, 151-154, 100 L.Ed. 149, 76 S.Ct. 219 (1956). Moreover, it cannot be said that the measure of recovery fixed by Congress in § 1497 is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty. *Rex Trailer Co. v. United States, supra*, 350 US, at 154, 100 L.Ed. 149. See *Murphy v. United States*, 272 US 630, 71 L.Ed. 446, 47 S.Ct. 218 (1926); *Marcus v. Hess, supra*.

"Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings . . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering v. Mitchell, supra*, 303 US, at 400, 82 L.Ed. 917."

CONCLUSION

Wherefore, appellants pray:

(1) That the order of judgment entered on April 20, 1973 in *Pursue Ltd. v. Lawrence S. Huffman* CIV No. 72-432 be reversed and that said action be dismissed for failure to state a claim upon which federal relief can be based.

(2) That *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et. al.* 72 CIV 0326 be ordered remanded back to the Court of Common Pleas of Allen County, Ohio to permit appellants to execute the final judgment of said court, entered on Nov. 30, 1972.

August 14, 1973 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of August, 1973, copies of the within Jurisdictional Statement were air-mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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Appendix A

Opinion and Order of Judgment of the Three-Judge District Court (Celebrezze, Circuit Judge, and Young and Walinski, District Judges) filed in the United States District Court for the Northern District of Ohio, Western Division in *Pursue Ltd., v Lawrence S. Hoffman, et al.*, No. C 72-432 on Apr. 20, 1973. ..... Page 3-12

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
Apr 20 8 57 AM '73
CLERK, U.S. DISTRICT COURT
Northern District of Ohio

PURSUE, LTD., etc.,)
Plaintiff,)
v.) No. C 72-432
LAWRENCE S. HUFFMAN, etc., et al.,) OPINION AND ORDER
Defendants.)

Before: CELEBREZZE, Circuit Judge, and YOUNG and WALINSKI, District Judges.

CELEBREZZE, Circuit Judge:

This is a suit under 42 U.S.C. § 1983 seeking injunctive relief and declaratory judgment against the assertedly unconstitutional provisions of the Ohio nuisance statute, O.R.C. §§ 3767.01, et seq., as it pertains to the exhibition of obscene movies.

On September 18, 1972, Defendant Huffman, Prosecutor of Allen County, Ohio, filed a civil complaint in the Allen County Court of Common Pleas, seeking a temporary injunction pursuant to O.R.C. § 3767.04 and a permanent injunction pursuant to O.R.C. § 3767.06 closing the Cinema I Theatre in Lima, Ohio, on the grounds that obscene movies were being shown therein in violation of O.R.C. §§ 3767.01 and .02. The Common Pleas Court conducted a hearing on Defendants' motion for a temporary injunction, at which the owners and William Dakota, then operator of the theatre, were represented by counsel and four motion picture films subpoened by Defendant

were reviewed. Finding that a nuisance existed on the premises, the Court on October 24, 1972, entered an order closing the theatre for an indefinite period, apparently pursuant to O.R.C. § 3767.04.

On October 25, 1972, William Dakota filed a complaint in this Court under case No. C 72-384, seeking a temporary restraining order against execution of the Common Pleas Court's judgment. By an Opinion and Order dated November 1, 1972, this Court stayed the state court injunction, but only to the extent that that injunction forbadethe showing of films which had not been held to be obscene in a prior adversary hearing.

The Common Pleas Court reconvened for the combined purpose of conducting a prior adversary hearing on films not yet reviewed and considering Defendants' application for a permanent injunction against the theatre. Photographs from 12 additional movies which had been shown at the theatre were reviewed. In a judgment entered November 30, 1972, the Court found in part as follows:

> "That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theater which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing."

Pursuant to O.R.C. § 3766.06, the theatre was therefore ordered closed "for any purpose for a period of one year unless sooner released by order of [the] Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio."

Plaintiff Pursue, Ltd.,[1] a Delaware corporation and assignee of William Dakota's leasehold interest in the theatre as of November 17, 1972, filed the present complaint in this Court seeking a temporary restraining order and preliminary and permanent injunctive relief against the above judgment of the Common Pleas Court and declaratory judgment respecting the asserted unconstitutionality of the Ohio statute. By an order entered December 1, 1972, a single judge of this Court stayed the judgment of the Common Pleas Court pending the convening of this three-judge Court, except insofar as that judgment applies to films which have been declared obscene in a prior adversary hearing.

The complaint lodges two general attacks upon the

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1. Although the final judgment of the Common Pleas Court was in part directed against William Dakota, predecessor to Plaintiff in the leasehold interest in the theatre, we find no difficulty in recognizing Plaintiff's standing to bring the present suit. The Ohio nuisance statute, O.R.C. § 3767.01, et seq., is primarily directed against property on which a nuisance is maintained. Accordingly, the Common Pleas Court's final judgment not only enjoined William Dakota and the other state defendants from conducting the nuisance, but also ordered the theatre itself closed. When the state court's judgment closing the theatre was entered, Plaintiff herein had clearly succeeded Dakota as leaseholder and operator of the theatre. We therefore find that Plaintiff clearly has standing to bring the present action, notwithstanding the fact that it was not a party to the state court proceedings.

constitutionality of the Ohio nuisance statute, O.R.C. § 3767.01, et seq. In its first general challenge to the statute, Plaintiff contends that the definition of "nuisance" found in Section 3767.01 respecting "... any place, in or upon which lewd, indecent, lascivious, or obscene films ... are exhibited..." is overly broad and void for vagueness.

In Grove Press, Inc. v. Flask, 326 F.Supp. 574, 578 (N.D. Ohio 1968) (appeal No. 70-1 pending before the Supreme Court), a three-judge court reviewed and rejected a similar challenge against the language of Section 3767.01. There, relying on the Supreme Court's decision in Roth v. United States, 354 U.S. 476 (1957), the Court held that language of Section 3767.01 was not overly broad so as to constitute a denial of due process. In Grove Press the Court assumed that Ohio's courts and prosecutors would give effect to the United States Supreme Court's limitations respecting obscenity and noted that the Supreme Court of Ohio had in fact done so in State v. Wages, 7 Ohio St. 2d 136 (1966). Significantly, the above-quoted portion of the Common Pleas Court's final judgment in the present case reflects the standards set forth in A Book Named "John Clelland's Memoirs of a Woman of Pleasure v. Massachusetts, 383 U.S. 413 (1966), further justifying the deference which we must grant to the state courts in applying the obscenity provisions of Section 3767.01.

Relying on the decision in Grove Press, Inc. v. Flask, supra

326 F.Supp. 578, we hold that the obscenity language of Section 3767.01 is not overly broad or void for vagueness.

As its second general attack upon the Ohio nuisance statute, Plaintiff contends that O.R.C. §§ 3767.04 and 3767.06 are unconstitutional in that they authorize a prior restraint on the exercise of First Amendment rights. Section 3767.06[2] provides in pertinent part that upon a determination that a nuisance exists upon a given premises, a common pleas court shall order the premises closed "for any purpose" for a period of one year unless the owner obtains a release from such order by demonstrating that the nuisance has been abated and posting a bond

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2. The relevant language of Section 3767.06 reads as follows:

> "If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one

conditioned on the nonrecurrence of the nuisance. Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this Section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden falling on the owner to come into court and prove the nonobscenity of any such other films.

Section 3767.04 provides that pending a final decision on an application for a permanent injunction, a common pleas court can order the closing of a given premises for certain purposes upon which a nuisance has been found to exist. To the extent that Section 3767.04 authorizes a court order closing a theatre without a prior adversary hearing on every film which is to be barred, the court will examine its constitutionality.

We agree with Plaintiff's argument that this provision under Section 3767.06 constitutes an overly broad prior restraint on its

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2 - continued:
year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code...."

First Amendment rights.[3] We recognize that the Supreme Court's decisions in Near v. Minnesota, 283 U.S. 697 (1931), Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), and New York Times v. United States, 403 U.S. 713 (1971), did not deal with prior restraints respecting allegedly obscene materials. Nonetheless, in Marcus v. Search Warrant, 367 U.S. 717, 731 (1961), the Supreme Court noted that "a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionality protected speech." See also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963).

In Marcus v. Search Warrant, supra, the Court struck down a state procedure under which a single police officer, operating under a search warrant, was permitted to conduct a mass seizure of materials which he alone deemed to be obscene, in the absence of a prior adversary hearing. See also A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964). Similarly, in Grove Press, Inc. v. Flask, 326 F.Supp. 574, 580-82 (N.D. Ohio 1970), the court declared unconstitutional a city

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3. That a corporation such as Plaintiff here has First Amendment rights appears to be well established. See New York Times v. United States, 403 U.S. 713 (1971); Bantam Books, 372 U.S. 58 (1963). Cf. Grosjean v. American Press Co., Inc., 297 U.S. 233, 244 (1936).

ordinance which permitted the seizure of allegedly obscene materials without a prior adversary hearing. Significantly, in Grove Press the Court rejected a constitutional attack upon the penalty provisions of the Ohio nuisance statute since the statute did require a prior adversary hearing respecting the obscenity of the single film involved in that case. See 326 F.Supp. at 579-80.

Unlike the Grove Press case, the present suit does not challenge the Ohio nuisance statute as applied to a single motion picture which has been adjudged obscene in a prior adversary hearing. Rather, we are here faced with an injunction under that statute which bars the showing of any films and closes the theatre "for any purpose" for a period of one year. Although a prior adversary hearing was conducted with respect to some 16 films in the theatre's possession prior to the state court's final judgment, the statute provides for no such hearing on any other films which the operator may have intended to show during the one-year period.

No less than the injunctive penalties imposed under the state nuisance statute in Near v. Minnesota, supra, the Common Pleas Court's order closing the theatre for one year constitutes an impermissible prior restraint in that no adequate safeguards -- in the form of prior adversary hearings -- are afforded for materials which might be non-obscene and thus protected by the First Amendment. See Bantam Books, Inc.

v. Sullivan, 372 U.S. 58, 65-66 (1963). Compare Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957). The invalidity of this procedure is not removed by the fact that under the statute Plaintiff can obtain a release from the court's order by satisfying the court that the nuisance has been abated. Such a procedure which places upon the individual or corporation the burden of proving that matter which he intends to distribute or exhibit is protected by the First Amendment is "but a step [toward] a complete system of censorship." Near v. Minnesota, supra, 283 U.S. at 721.

We conclude that the provision of O.R.C. § 3767.06 authorizing a state court to order the closing of a premises upon which a nuisance has been found to exist violates the Fourteenth Amendment when, as in the present case, that sanction precludes the showing of films which have not been found to be obscene in a prior adversary hearing and which thus might be protected by the First Amendment. We further conclude that the comparable provision in O.R.C. § 3767.04, authorizing a state court to close a premises pending a ruling on an application for a permanent injunction is similarly unconstitutional to the extent that it precludes the showing of films which have

not been determined to be obscene in a prior adversary hearing.

Defendants are therefore enjoined from executing that portion of the Allen County Common Pleas Court's judgment of November 30, 1972, which orders the closing of Plaintiff's theatre pursuant to O.R.C. § 3767.06. Having ruled upon the constitutionality of the state statutes, this three-judge court is dissolved and the case is remanded to Judge Nicholas J. Walinski for further proceedings under Plaintiff's claim for damages as set forth in the amended complaint.

Anthony J. Celebrezze

Bop J. Young

Nicholas J. Walinski

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on APR 2 0 1973

Dominic J. Cimino, Clerk

Appendix B

Ohio Revised Code, Sections 3767.01 thru 3767.11

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CHAPTER 3767: NUISANCES

Section

[DISORDERLY HOUSES]

3767.01 Definitions.
3767.02 Nuisance.
3767.03 Abatement of nuisance; bond.
3767.04 Injunction to prevent nuisance.
3767.05 Effects of action; evidence; costs.
3767.06 Costs of complaints and action.
3767.07 Court may punish violator for violation of injunction or writ.
3767.08 Tax when judgment establishes house, premises.
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[OTHER NUISANCES]

3767.12 Keeping a resort for thieves, prostitutes.
3767.13 Prohibition.
3767.14 Prohibition against throwing refuse, oil, or filth upon lawn, streets, or grounds.
3767.15 Fine and costs are a lien.
3767.19 Prohibition against dumping of dead animals and offal upon land or water.
3767.17 Prohibition against obstructing township or county ditch.
3767.18 Prohibition against polluting spring or well.
3767.19 Prohibition against nuisances when near state institutions.
3767.20 Disposal of garbage, refuse, or junk on public ways.
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3767.22 Exemptions.
3767.23 Prosecution of corporations for nuisances; abatement.
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3767.26 Judgment for fine and costs.
3767.27 Inspector of nuisances.
3767.28 Powers and duties of inspector.
3767.29 Abandoned refrigerators.
3767.30 Picketing during funeral or burial services.
3767.31 Deposit of harmful objects in recreational waters prohibited.
3767.32 Disposal of garbage and other waste along streams prohibited.
3767.33 Authorization of disposal of materials; injunction against disposal.
3767.99 Penalties.

[DISORDERLY HOUSES]

§ 3767.01 Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition, films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

HISTORY: GC § 6212-1; 107 v 314, 126 v 230, 129 v 1606; Ex 10-11-61

Cross-References to Related Sections

Penalty, RC § 3767.99(A)

Criminal penalties, RC § 2903.10 et seq.

Employment agency not to send applicant to, RC § 4143.12

Houses of ill-fame, power of municipality to suppress, RC § 715.32

Not to be kept near certain places, RC § 4303.11

Sellers of intoxicating liquors, when a nuisance, RC § 4301.73 et seq.

Comparative Legislation

Prostitution—abatement of nuisance

Cal.—Deering, Penal § 315

Ill.—Rev. Stat. 1965, ch 38, § 11 et seq.

Ky.—KRS § 233.010

Mass.—Ann Laws, ch 139, § 4

Mich.—Compiled Laws, § 610.3301 et seq.

N.Y.—Consol Laws, Penal § 230.00 et seq.

Pa.—Purdon's Stat, tit 60, § 497

Tenn.—Code Ann. § 23-501

W. Va.—Code 1966, § 61-8-1 et seq.

Research Aids

Page: Equity § 3, Nuisance §§ 10, 23 et seq., 34 et seq.

O-Jur2d: Disorderly Houses § 6, Nuisances § 18, Theaters §§ 15, 22

Am Jur2d: Disorderly Houses §§ 1-11

ALR

Pigs, keeping, 2 ALR3d 931.

Poultry, keeping, 2 ALR3d 965.

Motorbus or truck terminal as nuisance 2 ALR3d 1272.

Law Review

Nuisance in a nutshell. Howard L. Oleck. 5 ClevMLRev 143.

CASE NOTES AND OAG

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Abandoned nuisance defined, 5

Department of power, liberal or improper, when, 1

Nuisance determination, not person who stands, 2

Owner of land and lessee, when joint cause of maintaining nuisance, 4

Owner of land, sole responsibility, when, 3

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1. As result of the change in the manner by which a municipality is authorized into the law, there is an important and liberal distribution of power to administrative officials. Cincinnati v. King, 11 OO (2d) 443, 162

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2. The term "person," as defined in this section does not include municipal corporations and such [illegible] of municipal corporations under the provisions of RC [illegible] Therefore, a nuisance ordinance has no power over municipal corporations under this chapter. 1958 OAG No 1616.

3. Neither the Ohio statutes nor case decisions contain a legal definition as to what is an abandoned mine, but there is no reason to maintain that the term should encompass anything other than its usual connotation. 1959 OAG No 2221.

4. When RC 1511.181, which, with certain exceptions, declares the act of polluting any of the waters of the state to be a public nuisance, is read in connection with this section and RC 3707.02, it is apparent that both the owner and lessee of the [illegible] and both are responsible for the abatement thereof. 1959 OAG No 2221.

5. When a nuisance is created on leased premises by a lessee under an existing lease the owner of the land is solely responsible for its abatement after the expiration of the lease. 1959 OAG No 2221.

§ 3767.02 Nuisance. (GC § 6212-2)

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

HISTORY: GC § 6212-2; 107 v 514, § 2. Eff 10-1-55.

Penalty, RC § 3767.99(A).

Research Aids

O-Jur2d: Disorderly Houses § 6
Am-Jur2d: Disorderly Houses § 10

CASE NOTES AND OAG

See also case notes 4, 5 under RC § 3767.01; 1 under RC § 3767.07; 23 under RC § 3767.13.

1. The burning of combustible waste material on the lakefront dump by the city of Cleveland with the emission of acrid fumes, obnoxious smoke and offensive fly-ash constitutes a nuisance per se and is in violation of the statutes of Ohio and the ordinances of the city of Cleveland, and, where other methods of disposing of such material are available and can be made to work, the continued burning of such material, on the claim that an emergency exists, will not be permitted. Neuhouser v. Cleveland, 103 App 258, 6 OO 2d 69, 145 NE 2d 315.

2. An emission of smoke becomes a nuisance only when it is injurious to the health, damaging to property or annoying to the inhabitants of a locality, and an ordinance of a city making the emission of dense smoke per se a nuisance is invalid. Cleveland v. Mahn, 5 NP 203, 7 OD 124.

3. A prize fight when held in public is a common nuisance and injunction lies to prevent such contest, even though its commission would otherwise be punishable as a crime. State ex rel Attorney General v. Hobart, 8 NP 246, 11 OD 169.

§ 3767.03 Abatement of nuisance; bond. (GC § 6212-3)

Whenever a nuisance exists the attorney general, the prosecuting attorney of the county in which such nuisance exists, or any person who is a citizen of such county may bring an action in the name of the state, upon the relation of such attorney general, prosecuting attorney, or person, to abate such nuisance and to perpetually enjoin the person maintaining the same from further maintenance thereof. If such action is instituted by a person other than the prosecuting attorney, or attorney general, the complainant shall execute a bond to the person against whom complaint is made, with good and sufficient surety to be approved by the court or clerk thereof, in the sum of not less than five hundred dollars to secure to the party enjoined the damages he may sustain if such action is wrongfully brought, not prosecuted to final judgment, or is dismissed, or is not maintained, or if it is finally decided that the injunction ought not to have been granted. The party thereby aggrieved by the issuance of such injunction shall have recourse against said bond for all damages suffered, including damages to his property, person, or character and including reasonable attorney's fees incurred by him in making defense to said action.

HISTORY: GC § 6212-3; 107 v 514, § 3. Eff 10-1-55.

Cross-References to Related Sections

Penalty, RC § 3767.99(A).

See RC § 3767.02 which refers to RC § 3767.03 et seq.

See RC §§ 3767.04, 3767.05 which refer to this section.

Research Aids

Pace: Nuisance § 27
O-Jur2d: Disorderly Houses §§ 6, 9, 10. Theaters § 15
Am-Jur2d: Disorderly Houses §§ 40-47

ALR

Gun club, or shooting gallery or range, as nuisance. 29 ALR3d 661.

Law Review

Nuisance in a nutshell. Howard L. Oleck. 5 ClevMLRev 148.

CASE NOTES AND OAG

See also case note under RC § 3767.07.

1. That portion of RC § 4301.73, prescribing who may bring an action to enjoin the nuisance defined by such section is a special statutory provision which applies to a specific subject matter and constitutes an exception to the statutory provision set forth in RC § 3767.03, prescribing who may bring an action to abate and enjoin nuisances defined under the general provisions of RC § 3767.01, and such special statutory provision controls over the general statutory provision. State ex rel MacDonald v. Shawnee Country Club, 20 OApp(2d) 37, 49 OO 2d 61, 251 NE 2d 618.

2. An injunction will not be issued in an action brought by the prosecuting attorney where the operation of a garbage and waste disposal plant does not constitute a public nuisance. State ex rel Hover v. Bumpus, 60 OO 2d 230, 130 NE 2d 243 (App).

3. Where a tree is located on private property along a township road, but dead branches of the tree overhang the road and are dangerous to travelers on the road, the property owner has the primary duty to remove the dangerous condition. Although the board of township trustees is also obligated to remove said dangerous condition and has every power to take summary abatement proceedings under this section to compel the property owner to remove the danger, or the board may request that the director of agriculture act pursuant to RC § 1521.22 to alleviate the dangerous condition. 1961 OAG No 2210.

4. Where in a municipal corporation a dead tree is located on private property but overhangs a public street so as to cause danger to users of the street, the owner of the property has the primary duty to remove the dangerous condition but the municipal corporation also has a responsibility to protect users of the street, and the municipal corporation may institute nuisance abatement proceedings under this section to compel the property owner to remove the dangerous condition, or may request that the director of agriculture act pursuant to RC § 1521.22 to alleviate the dangerous condition. 1961 OAG No 2210.

§ 3767.04 Procedure in injunction action. (GC § 6212-4)

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after the filing. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court therein. The restraining order may be served by handing to and leaving a copy of such order with any person in charge of such place or residing therein, or by posting a copy thereof in a conspicuous place at or upon one or more of the principal doors or entrances to such place, or by both such delivery and posting. The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance. Any violation of such restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect.

A copy of the complaint, together with a notice of the time and place of the hearing on the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance as enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. The owner of any real or personal property closed or restrained or to be closed or restrained may appear between the filing of the petition and the hearing on the application for a permanent injunction and, upon payment of all costs incurred and upon the filing of a bond by the owner of the real property with sureties to be approved by the clerk in the full value of the property to be ascertained by the court, or, in vacation, by the judge, conditioned that such owner will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge is rendered on the application for a permanent injunction, then the court, or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance and that, with reasonable care and diligence, such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and discharge or refrain from issuing at the time of the hearing on the application for the temporary injunction any order closing such real property or restraining the removal or interference with such personal property. The release of any real or personal property under this section shall be free from any judgment, lien, penalty, or liability to which it may be subjected.

HISTORY: GC § 6212-4; 107 v 514, § 4. Eff 10-1-55.

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Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See also [illegible] which refer to the section.

Outlines of Procedure
Abatement of houses of prostitution, Leyshon No. 153, Temporary restraining order, No. 154.

Research Aids
Page: Nuisance §§ 28, 29, 31
O-Jur2d: Disorderly Houses §§ 7, 8, 13
Am-Jur2d: Injunctions §§ 13, 14

§ 3767.05 Priority of action; evidence; costs. (GC § 6212-5)

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or an admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

HISTORY: GC § 6212-5; 107 v 514 (516), § 5. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).

Research Aids
O-Jur2d: Disorderly Houses §§ 7, 11-14
Am-Jur2d: Disorderly Houses §§ 42, 43

§ 3767.06 Content of judgment and order. (GC § 6212-6)

If the existence of a nuisance is admitted or established in an action as provided in sections 3767.01 to 3767.11, inclusive, of the Revised Code, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order issued at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of the property under this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject. Owners of unsold personal property and contents so seized must appear and claim the same within ten days after such order of abatement is made and prove innocence, to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action is presumed to have had knowledge of the general reputation of the place. If such innocence is established, such unsold personal property and contents shall be delivered to the owner, otherwise it shall be sold as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the place and keeping it closed, a reasonable sum shall be allowed by the court.

HISTORY: GC § 6212-6; 107 v 514 (517), § 6. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See RC §§ 3767.08, 3767.11 which refer to this section.

Research Aids
Page: Nuisance § 31
O-Jur2d: Disorderly Houses § 13
Am-Jur2d: Disorderly Houses §§ 43, 45

ALR
Punitive damages in actions based on nuisance. 31 ALR3d 1348.

CASE NOTES AND OAG

1. An order for the abatement of a house of prostitution, under this section, is not a punishment of the criminal offense, under GC § 12701 [RC § 2905.14]. Wind v. State, 102 Oh 62, 130 NE 33.

§ 3767.07 Court shall punish offender for violation of injunction or order. (GC § 6212-5)

In case of the violation of any injunction or closing order, granted under sections 3767.01 to 3767.11, inclusive, of the Revised Code, or of a restraining order or the commission of any contempt of court in proceedings under such sections, the court or, in vacation, a judge thereof, may summarily try and punish the offender. The trial may be had upon affidavits or either party may demand the production and oral examination of the witnesses.

HISTORY: GC § 6212-8; 107 v 514 (519), § 8. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See RC § 3767.11 which refers to RC § 3767.07 et seq.

Research Aids
Page: Nuisances § 31
O-Jur2d: Disorderly Houses § 13
Am-Jur2d: Injunctions §§ 336-340

CASE NOTES AND OAG

1. The provisions of this section for punishing as contempt a violation of an injunction closing a house of prostitution do not violate the right of trial by jury. Such power is an inherent power of the court. Wind v. State, 102 Oh 62, 129 NE 33.

§ 3767.08 Tax when permanent injunction issues; payment. GC § 6212-9)

Whenever a permanent injunction issues against any person for maintaining a nuisance, there shall be imposed upon said nuisance and against the person maintaining the same a tax of three hundred dollars. Such tax may not be imposed upon the personal property or against the owner thereof who has proved innocence as provided in section 3767.06 of the Revised Code, or upon the real property or against the owner thereof who shows to the satisfaction of the court or judge thereof at the time of the granting of the permanent injunction, that he has, in good faith, permanently abated the nuisance complained of. The imposition of said tax shall be made by the court as a part of the proceeding and the clerk of said court shall make and certify a return of the imposition of said tax thereon to the county auditor, who shall enter the same as a tax upon the property and against the person upon which or whom the lien was imposed as and when other taxes are entered, and the same shall be and remain a perpetual lien upon all property, both personal and real, used for the purpose of maintaining said nuisance except as excepted in this section until fully paid. Any such lien imposed where the tax books are in the hands of the auditor shall be immediately entered thereon. The payment of said tax shall not relieve the persons or property from any other taxes. The provisions of the laws relating to the collection of taxes in this state, the delinquencies thereof, and sale of property for taxes shall govern in the collection of the tax prescribed in this section in so far as the same are applicable, and the said tax collected shall be applied in payment of any deficiency in the costs of the action and abatement on behalf of the state to the extent of such deficiency after the application thereto of the proceeds of the sale of personal property, and the remainder of said tax, together with the unexpended portion of the proceeds of the sale of personal property shall be distributed in the same manner as fines collected under section 2905.14 of the Revised Code.

HISTORY: GC § 6212-9; 107 v 514 (518), § 9. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See RC § 3767.09 which refers to this section.

Research Aids
O-Jur2d: Disorderly Houses § 8
Am-Jur2d: Disorderly Houses §§ 38, 39

§ 3767.09 Tax shall be imposed against owner of property. (GC § 6212-10)

When a nuisance is found to exist in any proceeding under sections 3767.01 to 3767.11, inclusive, of the Revised Code, and the owner or agent of such place wherein the same has been found to exist was not a party to such proceeding, and did not appear therein, the tax of three hundred dollars, imposed under section 3767.05 of the Revised Code, shall, nevertheless, be imposed against the persons served or appearing and against the property as set forth in this section. Before such tax is enforced against such property, the owner or agent thereof shall have appeared therein or shall be served with summons therein, and existing laws, regulating the service of process, shall apply to service in proceedings under sections 3767.01 to 3767.11, inclusive, of the Revised Code. The person in whose name the real estate affected by the action stands on the books of the county auditor for purposes of taxation is presumed to be the owner thereof, and in case of unknown persons having or claiming any ownership, right, title, or interest in property affected by the action, such may be made parties to the action by designating them in the petition as "all other persons unknown claiming any ownership, right, title, or interest in the property described in the action." Service thereon may be had by publication in the manner prescribed in sections 2703.14 to 2703.19, inclusive, of the Revised

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Code. Any person having or claiming such ownership, right, title or interest, and any mortgagee or agent in behalf of himself and all persons may make defense thereto and have trial of his rights in the premises by the court; and if said cause has already proceeded to trial or to findings and judgment, the court shall, by order, fix the time and place of such further trial and shall modify, add to, or confirm such findings and judgment. Other parties to said action shall not be affected thereby.

HISTORY: GC § 6212-10; 107 v 514 (519), § 10. Eff 10-1-53.

Penalty, RC § 3767.99(A).

Research Aids
O-Jur2d: Disorderly Houses § 6
Am-Jur2d: Disorderly Houses §§ 28, 30

§ 3767.10 Lease void if building used for lewd purposes. (GC § 6212-12)

If a tenant or occupant of a building or tenement, under a lawful title, uses such place for the purposes of lewdness, assignation, or prostitution, such use makes void the lease or other title under which he holds, at the option of the owner, and, without any act of the owner, causes the right of possession to revert and vest in such owner, who may without process of law make immediate entry upon the premises.

HISTORY: GC § 6212-12; 107 v 514 (519), § 12. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(A).
See RC § 3767.04 which refers to this section.

Research Aids
Page: Infcs, Lay, § 42; Land and Ten, § 52
O-Jur2d: Disorderly Houses § 5
Am-Jur2d: Land & Ten, §§ 1043, 1044

ALR
Construction and application of statute authorizing forfeiture or termination of lease because of tenant's illegal use of premises, 19 ALR2d 455

CASE NOTES AND OAG

1. A tenant who makes improvements to property, which improvements are to revert to the landlord at the expiration of the term, may not recover for the value of such improvements on the theory of unjust enrichment where the lease is forfeited because of the unlawful use of the property by the tenant. State ex rel Hoser v Bruton W. Campbell Co., 51 OO 317, 114 NE2d 615 (CP).

§ 3767.11 Procedure when nuisance established in criminal proceeding. (GC § 6212-7)

In case the existence of a nuisance is established in a criminal proceeding, the prosecuting attorney shall proceed promptly, under sections 3767.01 to 3767.11, inclusive, of the Revised Code, to enforce such sections, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside, shall be conclusive as against such defendant as to the existence of the nuisance. All moneys collected under such sections shall be paid to the county treasurer. The proceeds of the sale of the personal property, as provided in section 3767.08 of the Revised Code, shall be applied in payment of the costs of the action and abatement including the complainant's costs or so much of such proceeds as may be necessary, except as provided in sections 3767.07 to 3767.11, inclusive, of the Revised Code.

HISTORY: GC § 6212-7; 107 v 514 (517), § 7. Eff 10-1-53.

Penalty, RC § 3767.99(A).

Research Aids
O-Jur2d: Disorderly Houses § 6
Am-Jur: Prosecuting Atty, § 19

[OTHER NUISANCES]

§ 3767.12 Keeping a resort for thieves, prohibition. (GC §§ 12434, 12435)

A house or building used or occupied as a habitual resort for thieves, burglars, or robbers is a public nuisance, and the court may order such nuisance abated.

No person shall keep a house which is a habitual resort of thieves, burglars, or robbers. No person shall let a house to be so kept, or knowingly permit a house which he has let to be so kept.

HISTORY: GC §§ 12434, 12435; RS § 6859a; 85 v 8. Eff 10-1-53.

Cross-References to Related Sections
Penalty, RC § 3767.99(B).
Plaintiff shall not recover costs, when, RC § 2323.42.
Remedies against nuisance, RC § 3767.01 et seq.

Research Aids
Page: Nuisance §§ 10, 23
O-Jur2d: Disorderly Houses §§ 2, 6
Am-Jur2d: Disorderly Houses § 1

ALR
Institution for the punishment or rehabilitation of criminals, delinquents, or alcoholics as enjoinable nuisance, 21 ALR3d 1058

Law Review
Nuisance in a nutshell. Howard L. Oleck. 5 Clev MLRev 148

§ 3767.13 Prohibitions. (GC § 12446)

No person shall erect, continue, use, or maintain a building, structure, or place for the exercise of a trade, employment, or business, or for the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public. No person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public. No person shall unlawfully obstruct

Appendix C

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

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IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN
127-129 North Pierce Street
Lima, Ohio

PLAINTIFF

-vs-

WILLIAM H. DAKOTA
2650 West Market Street
Lima, Ohio

and

FLORA MAY COLLINS MOOR
104 South Dale Drive
Lima, Ohio

and

LELAND SAMUEL COLLINS
Address unknown

and

SARA LEE COLLINS
Address unknown

and

PUSSY CAT CORPORATION
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

CINEMA I. THEATRE
#69 Public Square
Lima, Ohio

and

JOHN DOE #1
c/o Cinema I
#69 Public Square
Lima, Ohio

CASE NO. 72 CIV 0326

COMPLAINT

JOHN DOE #2
c/o Cinema I
#69 Public Square

and

JOHN DOE #3
c/o Cinema I
#69 Public Square
Lima, Ohio

and

JOHN DOE #4
c/o Cinema I
#69 Public Square
Lima, Ohio

and

JOHN DOE #5
c/o Cinema I
#69 Public Square
Lima, Ohio

and

JANE DOE #1
c/o Cinema I
#69 Public Square
Lima, Ohio

and

JANE DOE #2
c/o Cinema I
#69 Public Square
Lima, Ohio

.. ..DEFENDANTS.. ..: .. ..

Now comes Lawrence S. Huffman, phintiff, and for his cause in equity to abate the motion picture theatre known as "Cinema I" as a public nuisance in Allen County, Ohio, states:

1. That he is the prosecuting attorney of Allen County, Ohio, and brings this action in equity in the name of the State of Ohio pursuant to Sections 3767.01, et seq., of the Ohio Revised Code;

2. That defendant, William H. Dakota, is the manager and person

in control of the Cinema I Theatre, a motion picture theatre located at #69 Public Square, Lima, Allen County, Ohio;

3. That defendants, Flora May Collins Moor, Leland Samuel Collins and Sara Lee Collins are the owners of the premises and building in which the Cinema I Theatre is operated and the legal description of said property is as follows:

> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet, six (6) inches, more or less, off of the entire East end of said lot.

4. That the defendant, Pussy Cat Corporation is a corporation which operates a motion picture theatre called Cinema I located at #69 Public Square, Lima, Ohio.

5. That defendants, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Jane Doe #1 and Jane Doe #2, whose names plaintiff cannot discover are employed at said Cinema I Theatre.

6. That the defendants, William H. Dakota, Flora May Collins Moor, Leland Samuel Collins, Sara Lee Collins, Pussy Cat Corporation, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Jane Doe #1 and Jane Doe #2 are now and have been deriving substantial revenues from the operation of the Cinema I Theatre and from the exhibition of obscene motion picture films in said theatre;

7. That for a period of ten weeks the Cinema I theatre has consistently shown obscene motion picture films in the City of Lima, County of Allen, State of Ohio, contrary to the laws of the State of Ohio; that such use of the premises described above establishes said premises as a nuisance, and, as such, the same should be abated;

(a) That the showing on the play dates July 12 -- July 18, 1972, of the motion picture "Man and Wife" was a violation of the obscenity and nuisance laws of the State of Ohio;

(b) That the showing on the play dates July 19 -- July 23, 1972, of the motion pictures "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio.

(c) That the showing on the play dates July 25 -- August 1, 1972, of the motion pictures "The Hangup" and "The Cutthroats" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(d) That the showing on the play dates August 2 -- August 8, 1972, of the motion pictures "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(e) That the showing on the play dates August 9 -- August 15, 1972, of the motion pictures "Prostitution, Pornography, U.S.A." and "Oddly Coupled" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(f) That the showing on the play dates August 16 -- August 22, 1972, of the motion pictures "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(g) That the showing on the play dates August 23 --

August 29, 1972, of the motion pictures, "Midnight Plowboy" and "Tobacco Roody" and the previews of coming attractions, was a violation of the obscenity and nuisance laws of the State of Ohio;

(h) That the showing on the play dates August 30 -- September 5, 1972, of the motion pictures, "The Blue Hour" and "The Grabbers" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(i) That the showing on the play dates September 6 -- September 12, 1972, of the motion pictures "Sweet Georgia" and "The Exotic Dreams of Casanova" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio;

(j) That the showing on the play dates September 13 -- September 18, 1972, of the motion pictures, "Marriage Manual" and "Love Under 17" and the previews of coming attractions was a violation of the obscenity and nuisance laws of the State of Ohio

That Appendices A --F and incorporated herein by reference as though fully set out are accurate time motion studies of the films named in paragraphs 7 (d) through 7 (i), which time and motion studies consist of a chronological series of photographs of each film, some of which have been timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen. Copies of said Appendices are not attached

to the copies of petitions to be served upon the defendants for the reason the costs of copies of said Appendices are prohibitive. Said Appendices can be examined in the original file of the Clerk of this Court.

8. (a) That on or about the 18th day of September, 1972, the defendant, Cinema I, caused a notice to be placed in the daily newspaper of Lima, Ohio, advertising the motion picture films "Marriage Manual" and "Love Under 17" at said Cinema I theatre; that the past and continuing exhibition of "Marriage Manual" and "Love Under 17" and the previews of coming attractions, and such other motion picture films as described herein at the Cinema I theatre did and does constitute a nuisance under Section 3767.01(C) of the Ohio Revised Code in that (1) the dominant theme of said motion picture films, taker as a whole, appeals to a prurient interest in sex; and (2) that said motion picture films are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters; and (3) said motion picture films are utterly without redeeming social value, which three elements coalesce.

9. That the exhibition of said motion picture films at Cinema I theatre is a violation of Chapter 3767 and other sections of the Ohio Revised Code in that such exhibitions cause moral pollution of the community and will cause and result in immediate and irreparable harm and damage to the morals and welfare of the people of the State of Ohio.

10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance

as that term is defined in Section 3767.01 (C) of the Ohio Revised Code, which reads in part as follows:

> "Section 3767.01 Definitions
>
> As used in all sections of the Revised Code relating to nuisances:
> (C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists, or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 1[illegible]; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14; fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

11. That each and all of the foregoing acts and the conduct of the defendants in the use of said property for the use and purposes and in the manner aforesaid, interferes in the tranquility, peace and quiet, generally, of plaintiff and the nearby communities, constitutes unlawful, unwarranted, and unreasonable use of defendants' property to the extreme annoyance, disturbance, discomfort, and hurt of plaintiff, and is detrimental to the public good and to the common welfare; such lewd acts and conduct are offensive to public decency, morals, peace, and health, and constitute a public nuisance which is subject to abatement under Chapter 3767 of the Ohio Revised Code, and should be forthwith enjoined and abated; and that unless enjoined by the Court, the defendants, and each of them, by themselves, and through their agents or representatives, will exhibit the motion picture films "Marriage Manual" and "Love Under 17" and other similar films at the Cinema I theatre and at other theatres near and in the close proximity to the community in which plaintiff resides, and elsewhere in the State of Ohio.

WHEREFORE, plaintiff prays:

1. That such nuisance be forthwith abated by order of the Court pursuant to the provisions set forth in Chapter 3767 of the Ohio Revised Code.

2. That pending a final determination of this action, the Court fix a time and place for the hearing of plaintiff's Motion for a Preliminary Injunction, (a) enjoining and restraining the defendants, pendente lite from maintaining such nuisance, and (b) requiring an accounting of the box office receipts

arising out of the exhibition of the above named motion picture films; that at the time and place so fixed, the defendants be required to appear with the above named motion picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box office receipts arising out of the exhibition of said motion picture films from the first exhibition thereof in the State of Ohio to and including the final performance after termination of the appeal in favor of the State of Ohio, and the same forfeited to the State of Ohio as contraband upon final determination of the appeal in favor of the State of Ohio.

3. That the defendants, and all of them, and all persons acting by, through, under or in concert with them be permanently enjoined and restrained from exhibiting said motion picture films in the State of Ohio;

4. That plaintiff have judgment for costs herein and for such other and further relief as the Court may deem proper.

STATE OF OHIO

By_____
Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read the foregoing Petition and that the

facts and allegations contained in the foregoing Petition are true as he verily believes.

_____

Sworn to before me and subscribed in my presence, this ____ day of _____, 1972.

_____
Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Plaintiff

CASE NO. _____

-vs-

WILLIAM H. DAKOTA, et al

Defendant

MOTION
FOR
TEMPORARY INJUNCTION

.. ..

picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box receipts arising out of the exhibition and showing of said motion picture films from the first exhibition thereof in the State to and including the final performance after termination of the appeal in favor of the State of Ohio; and the same be forfeited to the State of Ohio as contraband upon a final determination of the appeal in favor of the State of Ohio.

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

By_____

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN :

Plaintiff : CASE NO. _____

-vs-

WILLIAM H. DAKOTA, et al : NOTICE FOR HEARING

Defendant

:

.. ..

The defendants herein will take notice that a Motion for Temporary (Preliminary) Injunction will be for hearing before one of the Honorable Judges of the Court of Common Pleas of Allen County, Ohio, on the 26TH day of September, 1972, at 9:30 o'clock A.M., at the Courthouse in Lima, Ohio, or as soon thereafter as the Court can hear the same.

_____
Assignment Commissioner

Subpena Duces Tecum

CIVIL CASE

Revised Code, Sec. 2317.11, 13, 2105.07, 311.17

The State of Ohio, Allen County. Common Pleas Court

To William H. Dakota

John Doe #1 (Projectionist or Person or Persons in Possession of said films
John Doe #2

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the 26th *day of* September *A. D. 1972, at* 9:30 *o'clock* A *M., to testify as a witness in a certain case pending in said Court, wherein* State of Ohio, ex rel Lawrence S. Huffman *Plaintiff*, *and* William H. Dakota, et al *Defendants*;

and also that you bring with you and produce at the time and place aforesaid the following motion picture films:

1. "Man and Wife" for the play dates July 12 -- July 18, 1972;
2. "Hollywood Babylon" and "Down and Dirty" and the previews of coming attractions for the play dates July 19 -- July 25, 1972.
3. "The Hangup" and "The Cutthroats" and the previews of coming attractions for the play dates July 25 -- August 1, 1972.
4. "Wow, It's Cindy" and "Hot Spurs" and the previews of coming attractions for the play dates August 2 -- August 8, 1972.
5. "Prostitution, Pornography U.S.S." and "Oddly Coupled" and the previews of coming attractions for the play dates August 9 -- August 15, 1972.
6. "Sandra, The Making of a Woman" and "Diamond Stud" and the previews of coming attractions for the play dates August 16 -- August 22, 1972.
7. "Midnight Plowboy" and "Tobacco Roady" and the previews of coming attractions for the play dates August 23 -- August 29, 1972.
8. "The Blue Hour" and "The Grabbers" and the previews of coming attractions for the play dates August 30 -- September 5, 1972.
9. "Sweet Georgia" and "The Exotic Dreams of Casanova" and the previews of coming attractions for the play dates September 6 -- September 12, 1972.
10. "Marriage Manual" and "Love Under 17" and the previews of coming attractions for the play dates September 13 -- September 18, 1972.
11. "The Pig Keeper's Daughter" and "Please Don't Eat My Mother" and the previews of coming attractions for the play dates September 19 -- 25, 1972.

and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the Pltf.

WITNESS my hand and the seal of said Court, this 18th *day of* September *19*72

Robert D. Hinkle Clerk

By Gerald E. Wedeman Deputy

Appendix D

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et. al., Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County, Ohio to abate the Cinema I Theater as a public nuisance)

Papers included in Appendix: Page

Amended Complaint 3-8

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

PLAINTIFF

-vs-

CASE NO. 72 CIV 0326

WILLIAM H. DAKOTA aka
JACK DESMOND aka
WILLIAM KERN
2650 West Market Street
Lima, Ohio

and

FLORA MARY COLLINS MOOR
104 South Dale Drive
Lima, Ohio

and

LELAND SAMUEL COLLINS
510 River Street, R.D. #2
Madison, Ohio 44057

and

SARA LEE COLLINS (WALLACE)
1338 Monticello Boulevard, North
Saint Petersburg, Florida 33073

and

PUSSY CAT CORPORATION
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

CINEMA I THEATRE
#69 Public Square
Lima, Ohio

and

JOHN BROWNELL
1655 Reed Road
Lima, Ohio

AMENDED COMPLAINT

and :

ROBERT SMITH aka SISSON :
406 East North Street
Lima, Ohio :

and :

ALLEN R. BROWN :
2865 South Dixie Highway
Lima, Ohio :

and :

JOHN DOE #4 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

JOHN DOE #5
c/o Cinema I :
#69 Public Square
Lima, Ohio ::

and :

GERALDINE SCOTT :
150 East 10th Street
Lima, Ohio :

and :

JANE DOE #2 :
c/o Cinema I
#69 Public Square :
Lima, Ohio
:

and
:

All other persons unknown
claiming any ownership, right, :
title, or interest in the
property affected by the action. :

DEFENDANTS :

.. .. -

Now comes Lawrence S. Huffman, plaintiff, and pursuant to Rule 15, Ohio Rules of Civil Procedure, amends his original complaint filed herein on September 18, 1972, as follows:

1. That the caption of the case is amended to the following form:

State of Ohio, ex rel Lawrence S. Huffman
127-129 North Pierce Street
Lima, Ohio

Plaintiff

-vs-

William H. Dakota aka
Jack Desmond
aka William Kern
2650 West Market Street
Lima, Ohio

and

Flora Mary Collins Moor
104 South Dale Drive
Lima, Ohio

and

Leland Samuel Collins
510 River Street, R. D. #2
Madison, Ohio 44057

and

Sara Lee Collins (Wallace)
1338 Monticello Boulevard, North
Saint Petersburg, Florida 33073

and

Pussy Cat Corporation
#69 Public Square
Lima, Ohio

or

Los Angeles, California

and

Cinema I Theatre
#69 Public Square
Lima, Ohio

and

John Brownell
1655 Reed Road
Lima, Ohio

and

Robert Smith aka Sisson
406 East North Street
Lima, Ohio

and

Allen R. Brown
2865 South Dixie Highway
Lima, Ohio

and

John Doe #4
c/o Cinema I
#69 Public Square
Lima, Ohio

and

John Doe #5
c/o Cinema I
#69 Public Square
Lima, Ohio

and

Geraldine Scott
150 East 10th Street
Lima, Ohio

and

Jane Doe #2
c/o Cinema I
#69 Public Square
Lima, Ohio

and

All other persons unknown
claiming any ownership, right,
title, or interest in the
property affected by the action.

2. That paragraph 3 is amended to read as follows: "That defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace) are the owners of the premises and building in which the Cinema I Theatre is operated and the legal description of said property is as follows:

> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet six (6) inches, more or less, off of the entire east end of said lot,

and that persons unknown have or claim ownership, right, title or interest in the property above described."

3. That paragraph 5 is amended to read as follows: "That defendants, John Brownell, Robert Smith, Allen R. Brown, and Geraldine Scott are employed at said Cinema I Theatre; and that John Doe #4, John Doe #5 and Jane Doe #2, whose names plaintiff cannot discover are employed at said Cinema I Theatre."

4. That paragraph 6 is amended to read as follows: "That the defendants, William H. Dakota, Flora Mary Collins Moor, Leland Samuel Collins, Sara Lee Collins (Wallace), Pussy Cat Corporation, John Brownell, Robert Smith aka Sisson, Allen R. Brown, John Doe #4, John Doe #5, Geraldine Scott, Jane Doe #2, and all other persons unknown claiming any ownership, right, title or interest in the property affected by the action are now and have been deriving substantial revenues from the operation of the Cinema I Theatre and from the exhibition of obscene motion picture films in said theatre."

5. That paragraph 7 after subparagraph (J) is amended to read as follows: "That Appendices A -- G and incorporated herein by reference as though fully set out are accurate time motion studies of the films named in paragraphs 7(d) through 7(j), which time and motion studies consist of a chronological series of photographs of each film, some of which have been timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen. Copies of said Appendices are not attached to the copies of the petitions to be served upon the defendants for the reason the costs of said Appendices are prohibitive. Said Appendices can be examined in the original file of the Clerk of this Court;" and that attached hereto and incorporated herein by reference is said Appendix G.

6. That subparagraph (c) of paragraph 10 is amended to read as follows: "Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A -- G'" and that subparagraph (c) of paragraph 10 after Appendix F is amended to read as follows: "APPENDIX G. 'Marriage Manual' and 'Love Under 17'. Lesbianism depicted on pages 2 and 3; sexual intercourse

depicted on pages 7, 8, 9, 10, 11, 12, and 17; rape depicted on pages 14 and 15."

Plaintiff Lawrence S. Huffman re-alleges as if fully rewritten herein each and every other allegation, including all appendices contained in his original complaint.

STATE OF OHIO

By_____
Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

STATE OF OHIO
SS:
ALLEN COUNTY

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read his original complaint and the foregoing amendments to his original complaint and that the facts and allegations in the foregoing amendments and his original complaint, except as amended, are true as he verily believes.

_____

Sworn to before me and subscribed in my presence, this ____ day of September, 1972.

_____
Notary Public

Appendix E

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Order of Common Pleas Judge Robert M. Light, dated Oct. 24, 1972 3-4

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO ex rel LAWRENCE S. HUFFMAN :

Plaintiff : CASE NO. 72 CIV 0326

-vs- : O R D E R

WILLIAM H. DAKOTA, et al :

Defendant :

.. ..

This matter came on to be heard upon the verified complaint alleging facts constituting a nuisance, upon motion for a temporary injunction, on all and documentary evidence, upon oral and written argument of counsel, and the Court being fully advised in the premises finds that a nuisance exists as alleged at the Cinema I Theatre at #69 Public Square, Lima, Ohio, and the same should be forthwith abated.

The evidence shows that the realty upon which the Cinema I Theatre is located is owned by the defendants, Leland Samuel Collins, Flora Mary Collins Moor and Sara Lee Collins Wallace. The evidence further shows that William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that defendants Robert Smith, Allen R. Brown, John Brownell and Geraldine Scott are employed at said theatre.

The Court orders the Cinema I Theatre at #69 Public Square, Lima, Ohio, closed forthwith for any purpose of lewdness, to wit: the projection or screening of lewd, indecent, lascivious, or obscene films.

The defendants and all persons acting in any way in concert with them are hereby restrained from removing or in any

manner interfering with the personal property and contents of the premises at Cinema I Theatre, #69 Public Square, Lima, Ohio, until further Order of the Court.

The officer serving this Order shall forthwith make and return into Court an inventory of the personal property and contents situated in the building at #69 Public Square, Lima, Ohio, and used in conducting or maintaining the motion picture projection and screening therein.

Any violation of this Order shall be a contempt of Court; any mutilation or removal of this Order while the same remains in force shall likewise be a contempt of Court. The Court Orders that defendants show cause, if any they can, why this closing Order should not be made permanent as of this date.

Robert M. Light, Judge

Order

SEAL

-2-

Appendix F

William Dakota v. Sheriff Edward Fair of Allen County and Deputy Sheriff Joe Garlock, C72-384, (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix:	Page
Complaint filed October 26, 1972 (less Exhibits 1, 2 and 3)	3-9
Motion for Temporary Restraining Order, filed October 26, 1972	10
Motion for Preliminary Injunction, filed October 26, 1972	11
Memorandum in Support of Motions for a Temporary Restraining Order and Preliminary Injunction, filed October 26, 1972	12-21
Motion to Convene A Three Judge Panel, filed October 26, 1972	22
Memorandum of Law on Effect of Removal on State Court Action, filed in Allen County Common Pleas Court on October 26, 1972	23-24

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Dakota
2650 Market Street
Lima, Ohio

Plaintiff

-vs-

Sheriff Edward Fair
Sheriff of Allen County
Allen County Jail
Lima, Ohio 45801

and

Deputy Sheriff Joe Garlock
Deputy Sheriff of Allen County
Special Investigator Assigned
to the Allen County Prosecutor,
Lawrence Huffman
Allen County Court House
Lima, Ohio 45801

Defendants

C 72-384
Civil Action No.

COMPLAINT

Plaintiff for his claim against Defendants states:

1. Plaintiff, William Dakota, is the manager and lessee of the Cinema I Theatre, #69 Public Square, in Lima, Ohio which shows motion picture films to the public.

2. Defendants, Edward Fair and Joe Garlock, are citizens and residents of Allen County, Ohio, occupying the official position set forth in the caption.

3. The amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00).

4. This action arises under the First and Fourteenth Amendments to the Constitution, and this court has jurisdiction under 28 U.S.C. 1331. Jurisdiction is further based on 28 U.S.C. 1343, as this is an action to secure equitable relief for the protection of Plaintiff's civil rights pursuant to 42 U.S.C. 1983. Plaintiff also seeks a declaratory judgement under 28 U.S.C. 2201 and 2202.

5. This action seeks a temporary restraining order, preliminary injunction and permanent injunction to restrain the Defendants and their agents, representatives, employees, assigns

and successors, from obstructing, hindering or otherwise interfering with Plaintiff's right to keep open the Cinema I Theatre, #69 Public Square, Lima, Ohio for the presentation to the public of motion picture films.

6. Plaintiff also seeks a declaratory judgement under 28 U.S.C. 2201 and 2202, declaring Ohio Revised Code 3767.01 to 3767.11 inclusive, to be in violation of the First and Fourteenth Amendments to the United States Constitution.

On September 18, 1972 Plaintiff, William Dakota, was made a Defendant in a case styled State of Ohio, ex rel, Lawrence S. Huffman v William H. Dakota; 72 Civ 0326 which was filed in the Allen County Court of Common Pleas. The Complaint prayed for the Allen County Court of Common Pleas to (1) declare the Cinema I Theatre a nuisance; (2) that a preliminary injunction issue enjoining and restraining William Dakota from continuing to operate the Cinema I Theatre; (3) that there be an accounting of box office receipts and forfeiture of the same; (4) that William Dakota be restrained from exhibiting certain motion picture films named in the Complaint (See, Exhibit 1).

8. William Dakota was issued a subpoena duces tecum in State of Ohio, ex rel, Lawrence S. Huffman v William Dakota; 72 Civ 0326 requiring him to bring into court certain named films and business records (See, Exhibit 2). Plaintiff timely filed a Motion to Quash the subpoena duces tecum as a violation of his Fifth Amendment right and it was overruled by the court. Plaintiff timely filed a motion to declare the Ohio nuisance statutes unconstitutional in the state courts, but this motion was overruled.

9. A hearing was held in the Allen County Court of Common Pleas before Judge Robert Light on October 24, 1972. He ordered the theatre closed (See, Exhibit 3).

10. A Motion to Stay the Order set forth in paragraph 9 was filed and denied by the Allen County Court of Common Pleas.

11. A hearing on the permanent injunction is scheduled for November 30, 1972 and December 1, 1972 (See, Exhibit 4). The Allen County Court of Common Pleas has made it known that November 7, 1972 will be an alternative hearing date on the permanent injunction if the court's schedule provides.

12. William Dakota had agreed to stipulate to the permanent order in the state court reserving all objections made in the hearing on the preliminary injunction. The State of Ohio, through Lawrence Huffman, has rejected this offer

13. The order granting a preliminary injunction set forth in paragraph 9 is not a final appealable order under Ohio law. Only a permanent injunction can be appealed under Ohio law. Plaintiff's Cinema I Theatre must remain closed until the hearing on the permanent injunction and is left without an adequate remedy at law.

14. On October 24, 1972 at approximately 3:00 a.m the Defendant, Joe Garlock, padlocked the Cinema I Theatre. Plaintiff cannot show any motion picture films to the public at the Cinema I Theatre due to the state court's order and the action of the Defendants in enforcing the same.

15. The films viewed by Judge Light in the state court proceedings are constitutionally protected and are not obscene.

16. The closing down and padlocking of the Cinema I Theatre pursuant to 3767.01 through 3767.11 of the Ohio Revised Code is unconstitutional since the aforecited sections are patently unconstitutional under the provisions of the First and Fourteenth Amendments to the United States Constitution and the most recent decisions of the Supreme Court of the United States since they have provided a basis to compose a prior restraint on free speech without a prior adversary hearing, deny procedural due process, are overly vague and broad do not provide for a prompt, final judicial determination of the obscenity of the films in question, and fail to follow the standards of obscenity prescribed by decisions of the

17. The acts of Defendants herein alleged are acts under color of state law subjecting Plaintiff, a citizen of the United States, to a deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and causing Plaintiff to be deprived of his rights hereinabove alleged under the First and Fourteenth Amendments to the Constitution, in violation of 42 U.S.C. 1983.

18. Plaintiff has suffered and will continue to suffer irreparable harm and injury by reason of the acts of the Defendants in closing the theatre and is without an adequate remedy at law and is being denied by a total prior restraint from exercising his rights under the Constitution.

WHEREFORE, Plaintiff prays for the following relief:

(a) That a declaratory judgement issue declaring 3767.01 to 3767.11 inclusive, of the Ohio Revised Code to be void as violative of the Constitution of the United States, both on their face and as invoked against the Plaintiff by the closing down and padlocking of the Cinema I Theatre.

(b) That a temporary restraining order, preliminary and permanent injunctions issue restraining and enjoining the Defendants, their agents, servants, representatives and successors in office:

(1) From padlocking or attempting to close down the Cinema I Theatre and/or continuing the padlocking and enforced closure of the Cinema I Theatre.

(2) From padlocking or attempting to close down the Cinema I Theatre until the hearing on the permanent injunction is held in state court and/or continuing the padlocking and enforced closure of the Cinema I Theatre until the hearing on the permanent injunction is held in state court.

(3) From preventing Plaintiff from exercising his rights, privileges and immunities guaranteed to him by the Constitution and laws of the United States.

(c) For any and all other relief which the court may see fit to grant.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By _____
Ted Iorio

STATE OF OHIO)
)SS:
COUNTY OF LUCAS)

William Dakota, being first duly sworn according to law, deposes and says that he is the manager and lessee of the Cinema I Theatre, 169 Public Square, Lima, Ohio and is the Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof and that the facts and allegations therein are true.

_____
William Dakota

Sworn to and subscribed before me in my presence this 16th day of October, 1972.

_____
Notary Public

JUDY M. NAULT
Notary Public, Lucas County, Ohio
My Commission expires Dec. 8, 1976

THE COURT OF COMMON PLEAS
ALLEN COUNTY
LIMA, OHIO 45801

JOHN M. DAVISON
JOHN D. HARNISHFEGER
JUDGES

October 20, 1972

Ted Iorio
Law Offices of Jack Gallon
Teamster Building
435 S. Hawley Street
Toledo, Ohio 43609

IN RE: Huffman v Dakota - Case No. 72 Civ 0326

Dear Mr. Iorio:

Enclosed herewith is copy of order which will be filed with the Clerk of this Court on Tuesday, October 24, 1972, which in effect closes Cinema I. Also enclosed is notice of hearing on permanent injunction matters for November 30, 1972 and December 1, 1972, inasmuch as prosecution does not wish to waive the right to introduce further evidence herein. If you have any questions, it is presumed you will telephone the undersigned.

Thank you for all your courtesies.

Very truly yours,

Robert M. Light,
Presiding Judge

RML/mk

Enc. 2

EXHIBIT 4

CERTIFICATION C 72-334

I hereby certify that I called Lawrence Huffman, Prosecuting Attorney of Allen County, Ohio, who is the legal representative of the Sheriff and Deputy Sheriff, Defendants named herein, at [illegible] on the [illegible] day of October, 1972 to notify him that I would be attempting to obtain a temporary restraining order at 9:00 a.m. on October 26, 1972.

[illegible]

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Dakota)
)
Plaintiff)
)
-vs-)
)
Sheriff Edward Fair, et al)
)
Defendants)
)

C 72-384
Civil Action NO.

MOTION FOR TEMPORARY RESTRAINING ORDER

Now comes the Plaintiff, by and through his attorney, and requests the court to issue a temporary restraining order enjoining the Defendants from continuing the padlocking of the Cinema I Theatre, #69 Public Square, Lima, Ohio and enforcing the closure of the theatre. Plaintiff requests the temporary restraining order since Plaintiff's Cinema I Theatre is forcibly closed down and Plaintiff cannot invoke his First and Fourteenth Amendment right to free speech and will continue to suffer irreparable harm and be without an adequate remedy at law.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Dakota)
)
Plaintiff)
)
-vs-)
)
Sheriff Edward Fair, et al)
)
Defendants)
)

C 72-384
Civil Action No.

MOTION FOR PRELIMINARY INJUNCTION

Now comes the Plaintiff, by and through his attorney, and requests the court to set a hearing date to determine whether a preliminary injunction will issue granting injunctive and declaratory relief requested by the Plaintiff in the Complaint filed herein and preventing Defendants from continuing to padlock and enforce the closure of the Cinema I Theatre and from threatening or obstructing, hindering or otherwise interfering with Plaintiff's right of freedom of expression. Without a hearing on the Motion, Plaintiff will continue to suffer irreparable harm and be without the benefit of an adequate remedy at law.

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

NOTICE OF HEARING

Defendants will please take notice that the foregoing Motion will be heard before the Honorable
United States District Court Judge, U.S. Court House, Toledo, Ohio, on the day of at in the United States District Court for the Northern District of Ohio, Western Division, 213 U.S. Court House and Customs Building, 1716 Spielbusch Avenue, Toledo, Ohio 43624.

IT IS ORDERED: _____

IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Dakota	)	
Plaintiff	)	Civil Action No. C 72-384
-vs-	)	
Sheriff Edward Fair, et al	)	MEMORANDUM IN SUPPORT OF MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
Defendants	)	
	)	

FACTS

The facts at bar can be simply stated. Plaintiff at bar was the party Defendant in Huffman v Dakota; 72 Civ 0326 wherein the Plaintiff, Huffman, asked, among other requests for relief, a complete closing of the Cinema I Theatre which Plaintiff at bar manages and is the lawful lessee. After a hearing in state court, where Plaintiff at bar timely raised the question of the constitutionality of the nuisance statute (3767.01 to 3767.11, Ohio Revised Code), the state court ordered the closing of the theatre.

It is Plaintiff's contention that the Ohio nuisance statute is constitutionally deficient since it permits a total prior restraint preventing the Plaintiff at bar from showing any motion picture films in the future. Plaintiff's contention and others are supported by the rationale to follow.

UTILIZATION OF 3767.01, OHIO REVISED CODE TO ENJOIN THE DISSEMINATION OF FREE SPEECH MATERIAL IS VIOLATIVE OF THE PLAINTIFF'S RIGHTS BECAUSE, AS ONE CANNOT BE NOTIFIED TO FILE SUCH MATERIAL IS PRIOR RESTRAINT; (2) THE STATUTE DOES NOT PROVIDE A PROPER STANDARD FOR DETERMINING WHETHER A MOTION PICTURE FILM IS, IN FACT, OBSCENE; (3) THE STATUTE DOES NOT PROVIDE A PROPER FINAL JUDICIAL DETERMINATION PROMPTLY TO SATISFY THE CONSTITUTIONAL REQUIREMENTS.

The primary issue before this court is whether the Ohio state statutory nuisance scheme as applied to free speech material is unconstitutional as a prior restraint of the exercise of the right of free speech and press as guaranteed by the First and Fourteenth Amendments to the United States Constitution. 3767.04, Ohio Revised Code provides:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the Court or judges that the nuisance complained of is abated, or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Ohio Revised Code, the court adjudged shall forthwith issue an order closing. . . . . .

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> the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein."

The above-quoted section of the Ohio Code clearly indicates that the Court may close the theatre in question from future showings of any free speech material.

In Near v State of Minnesota, 283 U.S. 697, the United States Supreme Court held invalid a statute which is parallel to the statute at bar whereby the State of Minnesota attempted to enjoin a newspaper as a nuisance from continuing publication.

The lower Court in Near, ruled that the "Saturday Press" was a public nuisance and that it be abated and perpetually enjoined

> "from producing, editing, publishing, circulating, having in their possession, selling, or giving away any publication whatsoever which is malicious, scandalous, or defamatory newspaper as defined by law, and also from further conducting said nuisance under the name and the title of said "Saturday Press" or any other name or title."

The Defendant in Near, appealed to the United States Supreme Court which stated as follows:

> "This statute for the suppression as a public nuisance of a newspaper or periodical is unusual if not unique and raises questions of great importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty

> of the press and of speech is within the liberty, safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

The Court went on to point out that whatever harm may have been caused by the newspaper could have been remedied by the libel laws in Minnesota. The Court continued addressing itself to the prior restraint which the state order permitted. The Court commented:

> "The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication."

Simply stated, the Court in Near, rejected in toto any prior restraint judicial or legislative which would deny an individual his right to publish or screen any free speech material.

Since Near, which is a landmarked case in this area, numerous courts have followed its dictates. In Oregon Bookmark Corp. v Schrunk, 321 F. Supp. 639, the District Court ruled unconstitutional a city ordinance. That ordinance permitted the City Council to refuse to issue a license for the sale of books in a book store if the City Council deemed that store a nuisance.

The Court in Oregon Bookmark, addressed itself to the question whether a city has the constitutional power to employ a nuisance law for the purpose of censoring undesirable publications. The Court addressed that question in the following manner:

> "It is immaterial, however, whether the books examined by the Court are obscene. I assume they are, but the ordinance is unconstitutional on its face. It, therefore, makes no difference that it sweeps up the obscene in this case. It is capable of sweeping up the non-obscene as well. The defect in the ordinance is that it permits a type of censorship which depends upon the uncontrolled discretion of the City Council as censor."

The Court continued:

> "The city also urges that the Court should not require the city to license a public nuisance, but this argument is circular and it begs the question of whether traditional nuisance regulation is consistent with the First Amendment right. It is one thing to abate the sale of filthy food and another to abate the sale of filthy books. The food business is not protected by the First Amendment."

Similarly, at bar the Ohio nuisance statute provides in the event that the Court closes the theatre for a sweeping up of the obscene as well as the "sweeping up of the non-obscene."

In Grove Press v Philadelphia, 418 F. 2d 82, the Third Circuit Court of Appeals affirmed the lower court's ruling that the Pennsylvania authorities could not under the theory of nuisance enjoin the showing of the motion picture "I Am Curious - Yellow." The Court stated:

> "The city's attempt to enjoin the continued exhibition of "I Am Curious - Yellow" on the grounds that such an exhibition is a nuisance is a procedure repugnant to the due process clause of the Fourteenth Amendment in two aspects. First, the substance of standard by which the alleged obscenity of the movie is to be judged is so broad as to sweep within its purview constitutionally protected activities; and second, the standard is vague." (See, Grove Press v Philadelphia, 300 F. Supp. 281)

In State ex rel Little Beaver Theatre v Tobin, 259 So. 2d 30, the Appellate Court in Florida ruled that an injunction against the showing of certain films in the future was too broad in scope where it did not have reference to the films seized or to any specific films.

In Mitchum v Florida, 257 So. 2d 883, the Supreme Court of Florida overruled the lower Court which granted a permanent injunction enjoining the Defendants from selling obscene or pornographic materials and permanently enjoining him from further operation or maintenance of the business in the community. The Supreme Court of Florida as stated reversed and declared the injunction invalid in the following manner:

> "A business involved in the dissemination of publications cannot be declared a nuisance in this manner." (Near v Minnesota, supra)

As set forth previously in this memorandum, the Ohio nuisance statute provides for the complete shut down of the theatre at bar. The statutes permit this Court to put the theatre in question out of business and such action by this Court would constitute a prior restraint against the Plaintiff denying him the right to show whatever movie he chooses to show in the future without having any prior judicial determination as to whether the particular film involved is declared to be constitutionally obscene. As such, the statute in question by its very nature and purpose is invalid and unconstitutional and falls within the boundaries of the rationale of Near v Minnesota, and the other cases as aforecited.

In addition to the prior restraint problem, the Ohio nuisance statute provides no standard whatsoever for a proper judicial determination of whether a motion picture is obscene pursuant to Supreme Court standards. There are no guidelines set out, there are no references to other statutory definitions, there is no way in which the exhibiting of a motion picture could make a prior determination in choice as to whether he wished to show a motion picture film or not to avoid the far-reaching consequences of the Ohio nuisance statute.

In Interstate Circuit, Inc. v Dallas, 398 U.S. 676, the United States Supreme Court set down an ordinance because of the vague and indefinite definition of obscenity given by the ordinance. The hazards of a vague definition as set forth in the Interstate Circuit, case are borne out by the Supreme Court in the following manner:

> "Vagueness and the attended evils we have earlier described, are not rendered less objectionable because the regulation of expression is one of a classification rather than direct suppression."

In the case at bar, the Ohio nuisance statute provides no guidelines whatsoever as to what is "lewd, indecent, lascivious or obscene." (See, 3767.01 O.R.C.)

By comparison the ordinance in Interstate Circuit, at least contained vague guidelines. However, at bar the guidelines to determine what is obscene are totally absent.

Even assuming, that the definition of obscenity as contained in 2905.34 O.R.C. is meant to be absorbed as the definition in the Ohio nuisance statute, the statute would still be unconstitutionally vague. The definition of obscenity as contained in 2905.34 goes far beyond the definition of obscenity as set forth by the Supreme Court in Redrup v New York, 367 U.S. 154. In either event the statute must fail as being unconstitutionally vague.

In Friedman v Maryland, 380 U.S. 51, the Defendant therein was convicted in the Maryland state court for a violation of a provision in the Maryland movie picture censorship statute making it unlawful to exhibit a film without having obtained a license first. The Defendant contended that the statute in its entirety was unconstitutional and was a prior restraint. On appeal, the Supreme Court of the United States reversed.

The Court in Friedman, premised the reversal on the fact:

> "It is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination."

At bar, the Ohio nuisance statute lacks any assurance of a prompt judicial determination regarding the obscenity of the material in question. At bar, there is absolutely no time limit in which the hearing on the preliminary injunction must be held. Furthermore, there is nothing in the Ohio Appellate Procedure which provides for a speedy and expeditious appeal of an adverse decision to the Plaintiff.

The Court in Grove Press v Philadelphia, supra, also commented on the impropriety of the Pennsylvania nuisance statute:

> "Citing Friedman, the Court also viewed the Pennsylvania procedures in equity as an additional threat to the freedom of expression because they fail to guarantee prompt judicial determination of the First Amendment issue which was the subject of the preliminary restraint."

In Duggan v 807 Liberty, 288 A. 2d 750, the Supreme Court of Pennsylvania overruled the lower court's decision enjoining the showing of a movie pursuant to the nuisance statute because:

> "The Pennsylvania Rules of Civil Procedure simply do not designate when the final hearing must be held subsequent to the granting of a preliminary injunction."

The above-quoted language is readily applicable to the statute at bar.

In Meyer v Austin, 319 F. Supp. 457, the Federal Court declared the Florida obscenity statute unconstitutional in its entirety:

> "Although section 841.011 provides for an expedited trial procedure to minimize incursions on the right of protected expression, the statute makes no provision whatever for the expedited appellate consideration by the District Courts of Appeal. Because no prompt review is specified by law and unwarranted delay can occur before a final decision is reached, and during that delay the evanescent right of freedom on expression might be lost."

Again, by the same token the Ohio nuisance statute does not provide for an expedited appellate consideration by the Ohio appeals courts (See, Louisiana v Gulf States, 255 So. 2d 857).

In conclusion, the Plaintiff requests that this court grant the temporary restraining order as prayed for in the Complaint.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By _____
Ted Iorio

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IN THE UNITED STATES DISTRICT COURT
IN THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

William Dakota)
)
Plaintiff)
)
-vs-)
)
Sheriff Edward Fair, et al)
)
Defendants)
)

C -2-384

Civil Action No.

MOTION TO CONVENE A THREE JUDGE PANEL

Now comes the Plaintiff, by and through his attorney, and requests the court pursuant to 28 U.S.C. 2281 and 28 U.S.C. 2284 to convene a three judge panel.

Respectfully submitted,

LAW OFFICES OF JACK GALLON

By_____
Ted Iorio

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

State of Ohio, ex rel
Lawrence S. Huffman)
)
Plaintiff)
)
-vs-)
)
William H. Dakota, et al)
)
Defendants)
)

Civil Action No. 72-Civ-0326

MEMORANDUM OF LAW IN EFFECT OF REMOVAL ON STATE COURT ACTION

It is brought to the court's attention that the above-styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division that this memorandum is intended to show the effect of said removal upon the above-styled action.

The filing of a Petition for Removal under the statutes governoring the procedures for removal effects an automatic removal from state court to Federal District Court, and such removal stops any further proceeding in state court pending the District Court's action. 28 U.S.C., Section 1446 (e).

Compliance with the form and procedure of the removal under 28 U.S.C., Section 1446 is all that is necessary to effect automatic removal from the state court to the District Court. Baltimore and Ohio Railroad Company vs Koontz, 104 U.S. 5, 14, 26 L. Ed. 643 (1881); Flowers vs Aetna Casualty and Surety Company, 163 F. 2d 411, 415 (C.A. 6, 1967); Lowe vs Jacobs, 243 F. 2d 432 (CA 5, 1957); Southern Pacific Company vs Haight, 126 F. 2d 900 (CA 9, 1942).

The removal ends the power of the state court to issue any orders because the entire case has been removed. Allman vs Danley, 302 F. 2d 559 (CA 5, 1962). See also, Adair Pipeline Company vs Pipeliners Local Union 8798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd. 325 F. 2d 206 (C.A. 5, 1962). Herein it was held that presentations to the judge of the state court in open court at hearing on the Plaintiff's motion for temporary injunction of a copy of a Petition to Remove the case

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to federal court which the judge was obligated to turn over to the clerk of the state court regardless of whether he actually did so, was sufficient compliance by Defendants' attorney with statutory requirement that a copy of the Petition for Removal must be promptly filed with the clerk of the state court and the judge of the state court was on notice that the case had been removed and that he could proceed no further therein. (emphasis supplied).

After compliance with the removal statute the state court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are federal questions and must be decided in Federal Court. Lowe vs Jacobs, 243 F. 2d 432 (C.A. 5, 1957).

For the above reasons, Defendants have complied with the removal statute, there is respectfully suggested that this court no longer has any jurisdiction in this matter and is without power to proceed further.

Ted Iorio
435 S. Hawley Street
Toledo, Ohio 43609 (419) 248-5351

Gilbert Deitch
Suite 2005
1175 Peachtree Street, N.E.
Atlanta, Georgia 30309 (404) 892-8890

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed this 27 day of December, 1972 to Lawrence S. Huffman, Prosecuting Attorney for Allen County, Ohio, Lima, Ohio.

Appendix G

William Dakota v. Sheriff Edward Fair et al., (72-384) (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Opinion and Order of United States District Judge Nicholas J. Walinski, dated Nov. 2, 1972 3-4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
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CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

William Dakota	)	
	)	
Plaintiff,	)	
	)	
vs.	)	C 72-384
	)	
Sheriff Edward Fair, Sheriff of Allen County, et al.	)	OPINION AND ORDER
	)	
	)	
Defendants.	)	

This cause came to be heard on an application for temporary restraining order under Federal Rule of Civil Procedure 65.

The plaintiff herein, operator of a theatre in Lima, Ohio, seeks relief from an order of the Allen County Common Pleas Court pursuant to Ohio Revised Code ℗ 3767.01, et. seq. The theatre and all the equipment necessary for its operation have been padlocked as a nuisance under the procedures set forth in O.R.C. ℗ 3767.04. It is the opinion of this Court that the State injunction has been overbroadly applied. The statute, in pertinent part provides for a temporary injunction:

> "closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction"

As applied in the instant case, the actions of the State Court fly directly in the face of the United States Supreme Court decision in Near v. Minnesota, 283 U.S. 697(1931). In that case, a similar state statute provided

In conformity with Rule 77 (d) F.R.C.P.
please take notice that the following order of judgment
was entered in this court on NOV 2 1972
Dominic J. Civiles, Clerk

for the total closing of a newspaper for its prior violations of the state statute on libel. The Supreme Court held that such blanket prohibitions were constitutionally impermissible prior restraint of the exercise of free speech.

The Ohio Statute at bar does not present such an issue. Defendant herein is enjoined only from the exhibition of material which falls within the Supreme Court's definition as "obscene" See State ex rel Keating v. Vixen, 27 Ohio St. 2d 278 (1971). It must be assumed that the Ohio Courts will confine the injunction to material held obscene under the tests enunciated by the Supreme Court, and therefore beyond the protection of the First Amendment. Id at 200.

Since the Ohio Court may interpret the above-mentioned statute constitutionally upon hearing for the permanent injunction this Court will reserve a ruling on the convening of a three judge panel under 28 U.S.C. §2284 until such time as the federal abstention doctrine is inapplicable.

For the reasons set out above, it appearing to the Court that the petition for a temporary restraining order is well taken, in part, it is

ORDERED that the state injunction be stayed only so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio

Appendix H

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff Huffman, filed Nov. 5, 1972 3

Journal Entry of Nov. 5, 1972 4

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO,ex rel
LAWRENCE S. HUFFMAN

Plaintiff

Case No. 72 CIV 0326

vs

MOTION

WILLIAM H. DAKOTA et al

Defendants

Plaintiff says that on October 24, 1972, the Court ordered the Cinema I Theater, 169 Public Square, Lima, Ohio, closed for the purpose of the projection or screening of lewd, indecent, lascivious or obscene films, and that the defendant, William H. Dakota, was personally served a copy of said Order.

Plaintiff says that the defendant, William H. Dakota, has violated the terms of said Order by exhibiting in said theater on November 4, 1972, obscene motion picture films entitled "Sexual Freedom Now" and "Shoot-Out at Beaver Alls(sic)" which depict numerous scenes of sexual intercourse, cunnilinglus and fellatio.

WHEREFORE, plaintiff requests that the Court direct the defendant, William H. Dakota, to appear before the Court with said motion picture films forthwith so that the Court might determine whether said films are obscene, and upon such determination, to require the defendant to show cause why he should not be punished as for a contempt for his disobedience.

Lawrence S. Huffman, Plaintiff

State of Ohio
SS
County of Allen

Lawrence S. Huffman, being first duly sworn, deposes and says that he has read the foregoing Motion and that the facts and allegations therein contained are true as he verily believes.

Lawrence S. Huffman

Sworn to before me and subscribed in my presence this _____ day of November, 1972.

Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO,ex rel
LAWRENCE S. HUFFMAN

Plaintiff Case No. 72 CIV 0326

vs

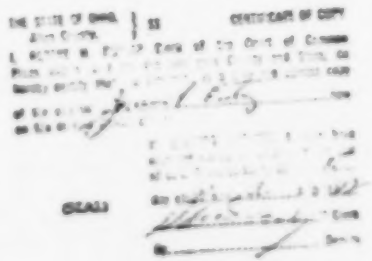
JOURNAL ENTRY

WILLIAM H. DAKOTA et al

Defendants

Upon sworn charges filed with the Clerk of Courts against William H. Dakota alleging disobedience of the said William H. Dakota to the former order of this Court directing the non-exhibition of obscene motion picture films at the Cinema I Theater, #69 Public Square, Lima, Ohio, on motion of the plaintiff, a rule is allowed herein against the said William H. Dakota directing him to appear before this court on November 7, 1972, at 9:00 AM, and to bring with him at such time the motion picture films "Sexual Freedom Now" and "Shoot-Out at Beaver Alls(sic)" so that a determination might be made as to whether said films are obscene, and upon such determination, to show cause why he should not be punished as for a contempt for his disobedience.

Judge



Appendix I

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Judgment Entry of Court of Common Pleas of Allen County, Ohio, dated Nov. 30, 1972 closing Cinema I Theater for a period of one year unless sooner released by order of court 2-4

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO ex rel LAWRENCE S. HUFFMAN	:	
Plaintiff	:	CASE NO. 72 CIV 0326
-vs-	:	
WILLIAM H. DAKOTA et al	:	JUDGMENT ENTRY
Defendant	:	

.. ..

This cause came on to be heard on the plaintiff's verified complaint and amended complaint and application for a permanent injunction, forfeiture of gross receipts received from exhibiting certain motion picture films, and plaintiff's costs, and the Court having considered the same, and having heard and considered the oral and documentary evidence presented, and having considered the arguments of counsel representing the parties, and having considered the evidence received upon plaintiff's motion for temporary (preliminary) injunction, pursuant to Ohio Rules of Civil Procedure 65(B), the Court finds the allegations of plaintiff's complaint and verified complaint are true and more specifically finds as follows:

(1) That the Cinema I Theater is operated by defendant William H. Dakota.

(2) That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theater which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing.

(3) That this conduct and the continuous exhibition

of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01(C) of the Ohio Revised Code;

(4) That defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins (Wallace) are the owners of the premises being used by the defendant, William H. Dakota, to engage in the conduct which constitutes a nuisance;

(5) That during the period beginning the first week of August, 1972, until the issuance of the preliminary injunction on October 24, 1972, the bank records of the defendant, William H. Dakota d/b/a Cinema I Theater disclosed deposits in the amount of

(6) That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara LeeCollins (Wallace), the owners of the premises at #69 Public Square in Lima, Ohio, leased said premises to the defendant, William H. Dakota, under the name of William Kern, Jr;

(7) That the defendants, John Brownell, Robert Smith, Allen R. Brown, and Geraldine Scott are employed at the said Cinema I Theater;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED as follows:

(1) That the defendants and all of the persons acting in concert or participation with them are hereby permanently enjoined and restrained from conducting the said nuisance;

(2) That the amount of Three Hundred Dollars ($300.00) deposited in the bank account of William H. Dakota d/b/a Cinema I Theater shall be forfeited to the State of Ohio and judgment is hereby rendered against the defendant, William H. Dakota, in said amount; of Three Hundred Dollars ($300.00)

(3) That all personal property and contents used in

conducting the nuisance as aforedescribed shall be removed from #69 Public Square, Lima, Ohio, and this personal property belonging to the defendants shall be sold in the manner provided for the sale of chattels under execution;

(4) That the Order of the Court closing the Cinema I Theater, issued by way of preliminary injunction dated October 24, 1972, shall be extended, and further, the place located at #69 Public Square, Lima, Ohio, and more particularly described as follows:

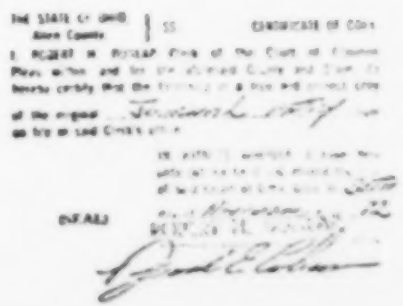
> Situate in the City of Lima, County of Allen and State of Ohio, and being all of Inlot Number One Hundred and Twenty-seven (127) in the Original Plat of the City of Lima, Ohio, excepting therefrom fifty-four (54) feet, six (6) inches, more or less, off of the entire East end of said lot,

is Ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio.

(5) That the defendant, William H. Dakota, pay the costs herein. Judgment for costs.

To all of which the defendants except.

Judge



Appendix J

Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al., C 72-432 (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Complaint filed Dec. 1, 1972 3-15

Temporary Restraining Order of United States District Judge Nicholas J. Walinski, filed Dec. 1, 1972 16

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Pursue, Ltd., a Delaware corporation Plaintiff -vs- Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio and Edward Fair in his capacity as Sheriff of Allen County, Ohio Defendants Also serve, in their statutory capacity only, under 28 U.S.C., Section 2284 (2), and not as Defendants His Excellency, John Gilligan, Governor of the State of Ohio, State House Annex Columbus, Ohio and The Honorable William Brown, Attorney General of the State of Ohio State House Annex Columbus, Ohio	C 72-432 Civil Action No. COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, DECLARATORY JUDGEMENT AND CONVOCATION OF THREE-JUDGE COURT

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Plaintiff, by and through its attorneys-at-law, Ted Iorio, Esquire; Gilbert H. Deitch, Esquire and Robert Eugene Smith, Esquire, complaining of Defendants herein, jointly and severally, respectfully alleges as follows:

I.

JURISDICTION

1. This is a civil action whereby Plaintiff prays a temporary restraining order, and a preliminary and permanent injunction issue to restrain Defendants, and each of them, from acting under the law of Ohio to close Plaintiff's place of business as a "nuisance," as that term is understood under Ohio law, Ohio Revised Code, Sections 3767.01 et seq. Plaintiff prays, as well, a declaratory judgement

abate a "nuisance" under said law, as written and/or as applied herein. Plaintiff prays for a three-judge court to make such determination.

2. This is also a civil action whereby Plaintiff prays a temporary restraining order, and a preliminary and permanent injunction issue to restrain Defendants from acting under Sections 3767.01 et seq. of the Ohio Revised Code to prohibit the dissemination of any motion picture films at Cinema I Theatre, 69 Public Square, Lima, Ohio.

3. Jurisdiction is conferred on this court for the resolution of the substantial constitutional questions herein presented by 28 U.S.C., Section 1343 (3), which provides, in pertinent part, that the District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> "To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage of any right, privilege or immunity secured by the Constitution of the United States. . . .."

and the organic law which authorizes the institution of this suit founded on 42 U.S.C., Section 1983, which provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

4. Suit is further founded on 28 U.S.C., Section 1343 (4) "to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights....." as well as Article III, Section 2 of the Constitution of the United States.

5. Prayer for Injunctive Relief is founded on Rule 65 of the Federal Rules of Civil Procedure.

6. Prayer for Declaratory Relief is founded on Rule 57 of the Federal Rules of Civil Procedure, as well as 28 U.S.C., Section 2201.

7. Jurisdiction for convocation of a Three-Judge Court is founded on 28 U.S.C., Sections 2281 and 2284.

II.

PARTIES

8. Plaintiff, Pursue, Ltd., is engaged, through its agents, servants and employees, in the dissemination of movies which are presumptively protected under the First Amendment to the Constitution of the United States.

9. The materials disseminated by Plaintiff, Pursue, Ltd., are comparable to those declared not to be obscene by the Supreme Court of the United States, and many other inferior Federal Courts, as well as state appellate courts, and hence, are protected expression under the First Amendment to the United States Constitution. No persons under eighteen (18) years of age (minors) are allowed entrance within Plaintiff's theatre, nor is there "pandering" in the Ginzburg sense, nor are the materials disseminated in such a way that unwilling persons cannot avoid them.

10. Upon information and belief, Lawrence S. Huffman, is named as a Defendant in his capacity as Prosecutor of Allen County, Ohio and as an official authorized by Ohio law to act on behalf of the State of Ohio to abate a "nuisance" pursuant to Section 3767.03 of the Ohio Revised Code.

11. Upon information and belief, Edward Fair is named as a Defendant in his capacity as Sheriff of Allen County, Ohio, having cognizance of the enforcement of the state statutes and having supervisory direction over the members of the Lima Police Department.

12. The named Defendants, in their official capacities only as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and permanent injunction, declaratory judgement and/or other order that may issue by this court.

III.

FACTUAL ALLEGATIONS

13. At all times relevant hereto, Defendants and/or their agents, servants or employees, and others acting under their direction and control, and each of them, separately and in concert, under color and pretense of law, to-wit, under color of state statutes referred to hereinabove, have deprived and are continuing to deprive Plaintiff, its agents, servants and employees of rights, privileges and immunities guaranteed to them by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, as well as depriving adult citizens of the City of Lima, the State of Ohio, and visitors thereto, of access to nonobscene materials protected by the First Amendment to the Constitution of the United States, offered for exhibition under nonobtrusive circumstances to interested adults only.

14. Plaintiff adopts by reference and incorporates herein the factual allegations of the Complaint filed with this Court in the case of William Dakota v Sheriff Edward Fair, Docket No. C 72-384, filed October 26, 1972.

15. On November 17, 1972 Plaintiff purchased the interest of William Dakota in Cinema I Theatre and obtained by assignment for valuable consideration all rights and duties of William Dakota as lessee of the premises of 69 Public Square, Lima, Ohio.

16. The purchase and assignment of lease referred to above became effective November 17, 1972 and Pursue, Ltd. commenced to operate Cinema I, 69 Public Square, Lima, Ohio.

17. On November 30, 1972, in the Court of Common Pleas of Allen County, Ohio, the Honorable Robert M. Light, Judge, heard testimony in the case of State of Ohio, ex rel Huffman v William Dakota, et al, No. 72 Civ 0326 upon the State's application for a permanent injunction against Defendants therein.

18. On November 30, 1972 at approximately 2:30 p.m. the Court issued an order of permanent injunction against Defendants thereby ordering the closing of Cinema I for one (1) year and ordering the property therein sold pursuant to Ohio law, Sections 3767.0, et seq. of the Ohio Revised Code. Within two (2) hours the theatre was padlocked and the keys of Plaintiff's employee were seized by law enforcement agents.

19. Notwithstanding this Court's opinion and order entered November 2, 1972 in Dakota vs Fair, et al, No. C 72-384, the Honorable Robert M. Light failed to comply with this Court's opinion as to the impermissibility of Prior Restraints upon Free Speech and Press guaranteed by the First Amendment to the Constitution of the United States, and effectively enjoined the dissemination of any and all motion picture films, whether or not sexually oriented. (Exhibit A)

20. Said nuisance action has imposed a prior and indeed, permanent, restraint, upon the dissemination of materials presumptively protected by the First Amendment to the Constitution of the United States and is designed to have a "chilling effect" upon the exercise of said freedoms by Pursue, Ltd.

21. The Defendants and/or their agents, servants and employees have established a pattern of conduct under color of enforcement of state law, under facially invalid statutes, attemp-

ting the ultimate suppression of presumptively protected motion picture films without, to this date, ever having had any final judicial determination that any of said motion picture films of Plaintiff are, in fact obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the acts of utilizing nuisance laws, as well as other unconstitutional enactments and conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiff's First Amendment rights, as well as the right of interested adult citizens of the City of Lima and the State of Ohio and who wish to exercise their First Amendment right to view nonobscene motion picture films. The efforts on the part of Defendants to close Plaintiff's business and the closure under the guise of the abatement of a nuisance constitute attempts at a constitutionally invalid "prior restraint" which is condemned by the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and which might be apropos in a police state, but is anathema to a free society such as ours.

IV.

BASIS IN LAW FOR RELIEF

22. The aforesaid conduct of Defendants, their agents, servants, employees and attorneys, and others acting under their direction and control, and each of them, in seeking to close Plaintiff's business under the guise of abating a nuisance under the conditions here present is a "prior restraint," condemned by the Constitution of the United States and has a "chilling effect" on the exercise of Plaintiff's constitutional rights, more particularly the First and Fifth Amendments thereof, as made obligatory on the states under the Fourteenth Amendment. The conduct of Defendants, their agents, servants, and employees, in seeking to close Plaintiff's business is deprivation of Plaintiff's rights to due process under the Fifth Amendment to the Constitution, as well as an all-too-effective restraint on the exercise of Plaintiff's right to see, disseminate and distribute presumptively protected material

to the interested adult public.

23. As a further result of the conduct of the Defendants, their agents, servants, employees and attorneys, the Plaintiff has been intimidated in its trade and business, and if the business remains closed, it will suffer complete loss of profits, as well as damages as a result of the substantial interference with its advantageous business relations.

24. By reason of the conduct of the Defendants, their agents, servants, employees and attorneys, as aforesaid, the civil rights of Plaintiff under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, have been violated to its irreparable harm. Unless enjoined, Defendants, their agents, servants, employees and attorneys, will continue in the course of conduct to Plaintiff's further imminent and irreparable harm, for which it has no plain adequate remedy at law, and the conduct of Defendants, their agents, servants, employees and attorneys, has had and threatens to have a continuing "chilling effect" on the Plaintiff's exercise of its First Amendment freedoms. Immediate and irreparable injury, incalculable loss, and damage will result to Plaintiff if a preliminary injunction is not issued, forbidding Defendants, their agents, servants, employees and attorneys, from continuing in their proposed, wholly illegal conduct as aforesaid, under color of enforcing said state statutes and nuisance laws to Plaintiff.

25. The aforesaid Ohio nuisance law, Section 3767.01 et seq. of the Ohio Revised Code, are as written and/or as applied to Plaintiff, repugnant to the Constitution of the United States for the following reasons.

(a) Said statutory provisions are void for vagueness in that the same prohibit the doing of an act in terms so vague, fluid, and indefinite that men of common intelligence must necessarily guess at the meaning and differ as to the application thereof,

and as such, are repugnant to the Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States; and further,

(b) Said statutory provisions are void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the statute and law set forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court in First Amendment matters; and further,

(c) Said statutory provisions are void for vagueness and impermissible overbreadth, in the area of First Amendment freedom, because the said provisions are susceptible of sweeping and improper application by Defendants and have a "chilling and inhibiting effect" on the exercise of the federal and state constitutional rights of citizens of the State of Ohio and the United States, as well as those of Plaintiff, to publish, disseminate, distribute, circulate, sell, receive and/or purchase movies and printed publications; and further,

(d) Said statutory provisions are repugnant to the substantive Due Process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States because they permit deprivation of liberty and/or property interests for the exercise of First Amendment rights by unreasonable, arbitrary, and capricious means by Defendants and/or their agents, servants, employees and attorneys without a showing of a real and substantial relationship to any state subordinating interest which is compelling to justify state action limiting the exercise by Plaintiff of First Amendment freedoms; and further,

(e) Said statutory provisions are impermissibly broad and repugnant to the procedural Due Process requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States by employing means lacking adequate safeguards which Due Process demands to assure nonobscene materials sought to be

of the First Amendment, to which they are entitled; and further,

(f) Said statutory provisions are vague and impermissibly overbroad and thus repugnant to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution in that said provisions permit inherent powers of censorship and suppression, constituting a prior restraint of the exercise of Plaintiff's First Amendment rights by Defendants.

26. Said statutory provisions are repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States for the following reasons:

(a) Said statutes as written and/or as applied to Plaintiff constitute a classical "prior restraint," on materials which are presumptively protected under the First Amendment to the Constitution of the United States, which has been condemned by the Supreme Court of the United States in an unbroken string of cases beginning with Near v Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) and continuing through 1971 with its decisions in New York Times Company vs United States, 403 U.S. 713 (1971), and Organization for a Better Austin vs Keefe, 402 U.S. 415, 29 L. Ed. 2d 1 (1971).

(b) Said law of nuisance denies Due Process and Equal Protection of the Laws to Plaintiff in that said law makes a public nuisance of a business, rendering it subject to closure under the guise of abating a nuisance, on the basis of isolated transactions as to a few of possibly thousand of presumptively protected motion picture films without any showing of traditional elements necessary to constitute a continuing public or common nuisance; all of which is repugnant to the First, Fifth and Fourteenth Amendments to the United States Constitution;

(c) Moreover, the Ohio law of nuisance, by labelling a place of business a nuisance on the basis of isolated transactions, creates an invalid presumption of the type condemned by the United States Supreme Court in Leary vs United States, 395 U.S. 6, 89

S. Ct. 1532, 23 L. Ed. 2d 56, in that it violates the Fifth and Fourteenth Amendments of the Constitution of the United States;

(d) Moreover, said presumption deprives Plaintiff of its Fifth and Fourteenth Amendment rights under the Constitution of the United States to have every element making up a nuisance to be proven, by competent evidence, in a First Amendment context, beyond a reasonable doubt.

V.

RELIEF SOUGHT

27. Plaintiff is further entitled to and desires that this Court enter a declaratory judgement on final hearing under the provisions of 28 U.S.C., Section 2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring Ohio nuisance law, Section 3767.01 et seq of the Ohio Revised Code, as written and/or as applied, unconstitutional.

28. Plaintiff is entitled to and desires that a three-judge court be convened to determine the constitutionality of said statute Sections, pursuant to 28 U.S.C., Sections 2231 and 2284.

29. Plaintiff is entitled to and desires that this Court issue a temporary restraining order, a preliminary and permanent injunction restraining and enjoining each of the Defendants, their agents, servants, employees and attorneys, and any and all other persons acting under their direction and control, and each of them, and persons in active concert with them from proceeding against Plaintiff in the action referred to in Paragraph 17 hereof.

WHEREFORE, Plaintiff prays:

1. That a three-judge court be convened to hear and decide the issues raised herein.

2. That a temporary restraining order issue, restraining Defendants, and/or their agents, servants, employees and attorneys, pending a hearing and determination of Plaintiff's application for permanent injunction from continuing to proceed against Plaintiff in the action referred to in Paragraph 17 hereof.

made pursuant and said statute Sections and law of nuisance referred to hereinbefore be declared unconstitutional as written and/or as applied to the controlled dissemination of adult-type materials to persons eighteen (18) years of age or older in a nonobtrusive manner, absent Ginzburg-type pandering, by Plaintiff herein.

4. That a permanent injunction issue restraining Defendants, their agents, servants, employees and attorneys and any and all other persons acting under their direction and control from (a) enforcing or acting under said statute Sections and law referred to above in an unconstitutional manner, or to apply them in a manner to obtain unconstitutional results with respect to this Plaintiff, its agents, servants and employees and (b) otherwise harassing Plaintiff in the conduct of its lawful business without first securing and providing for, after due notice to Plaintiff, a judicially superintended prior adversary hearing on the issue of obscenity, in the constitutional sense.

5. That the Governor and the Attorney General of the State of Ohio be given notice by registered mail of the pendency of Plaintiff's application for preliminary and permanent injunction as required by 28 U.S.C., Section 2284 (2).

6. That Plaintiff have such other and further relief as may be appropriate under the circumstances in this case, together with costs.

Respectfully submitted,

Ted Iorio, Esquire
435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

Gilbert H. Deitch, Esquire
Suite 2005
1175 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-0890

Robert Eugene Smith, Esquire
Suite 507
102 West Pennsylvania Avenue
Towson, Maryland 21204

COUNTY OF [illegible])
)SS:
STATE OF OHIO)

AFFIDAVIT

Before me, the undersigned, a Notary Public, in and for the State of Ohio, this 1st day of December, 1972, did personally appear a person known to me to be Gilbert H. Deitch and who is known to me to be Counsel for Plaintiff, Pursue, Ltd., and who, after being duly sworn, did depose and affirm that the allegations of the Complaint are true and correct to the best of his information, knowledge and belief.

Gilbert H. Deitch

Sworn to and subscribed before me, this day of December, 1972.

Notary Public

CERTIFICATE OF SERVICE

This is to certify that on November 30, 1972 at approximately 4:00 p.m., Ted Levin notified Lawrence S. Huffman by telephone that Gilbert H. Deitch would seek a temporary restraining order before this court on December 1, 1972.

Gilbert H. Deitch

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., etc.,

Plaintiff,

-vs-

LAWRENCE S. HUFFMAN, etc., et al.,

Defendants.

No. C 72-432

ORDER

* * *

This cause came to be heard on plaintiff's motion for a temporary restraining order pursuant to Rule 65, Federal Rules of Civil Procedure.

The complaint filed herein attacks the constitutionality of Ohio Revised Code, § 3767.01, et seq. It appearing to the Court that the plaintiff has made an attempt to notify the defendants, argument was heard in an ex parte proceeding. To prevent great and immediate irreparable harm to the plaintiff, prior to the convening of a three-judge court in this matter, pursuant to 28 U.S.C., § 2284, it is

ORDERED that the judgment entry of the Allen County Common Pleas Court in Cause No. 72 CIV 0326, dated November 30, 1972, is hereby stayed except insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

A True Copy
Filed DEC 1 1972
Attest
By
Date DEC 1

Appendix K

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., Case No. 72 CIV 0326 (being a Civil Action, in the Court of Common Pleas of Allen County, Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff Huffman, filed Dec. 4, 1972 3

IN THE COMMON PLEAS COURT OF ALLEN COUNTY, OHIO

State ex rel Lawrence S. Huffman PLAINTIFF -vs- William H. Dakota, et. al. DEFENDANTS	:	CASE NO. 72 CIV 0326 MOTION

Plaintiff requests that the motion picture films located at the premises known as #69 Public Square, Lima, Ohio, the subject of this action, be viewed by the Court and that a judicial determination be made as to whether said films are or are not obscene.

Plaintiff further requests that upon a finding that said films are obscene, the Court order that said films not be exhibited at #69 Public Square, Lima, Ohio.

State ex rel Lawrence S. Huffman

By _____
Attorney for Plaintiff

CERTIFICATE

This is to certify that notice was given of the hearing on this motion set for 10:30 A.M., Monday, December 4, 1972, to Malcolm Basinger, attorney for Flora Mary Collins Moore, Leland Samuel Collins and Sara Lee Collins (Wallace) and Ted Iorio, attorney for the other defendents in this cause and Robert Hollis.

_____
Attorney for Plaintiff

Appendix L

William H. Dakota et al., v. State of Ohio, ex rel Lawrence S. Huffman, C72-445, (being a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix:	Page
Petition for Removal, filed Dec. 11, 1972.	3-6
Notice of Removal, filed Dec. 11, 1972.	7
Motion to Remand, filed Dec. 18, 1972.	8-9
Memorandum in Support of on Motion to Remand (less Exhibits A-F) filed Dec. 18, 1972.	10-14
First motion for Immediate Hearing, filed Dec. 18, 1972, on Motion to Remand.	15-17
Order Designating Three Judge Court, filed Dec. 11, 1972.	18-19
Order that Briefs be filed Jan. 15, 1973, filed Dec. 21, 1972.	20
Stipulation for Leave to Plead, filed Dec. 27, 1972.	21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

State of Ohio, ex rel
Lawrence S. Huffman

Respondent,

-vs-

William H. Dakota, et al

Petitioners

C 72-445

Civil Action No.

PETITION FOR REMOVAL

W

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION:

The Petition of William H. Dakota, et al shows:

1. An action was commenced against Petitioners in the Court of Common Pleas, Allen County, Ohio entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff against William H. Dakota and Flora May Collins Moor, and Ieland Samuel Collins, Sara Lee Collins and Bussycat Corporation and Cinema I Theatre, John DOES and Jane DOES, Defendants, by the service upon them of a Summons and Complaint and Amended Complaint. Further proceedings have been had therein to-wit: two evidentiary hearings which resulted in temporary and permanent injunctions closing Petitioners' business.

2. The above-described action is a civil action which may be removed to this court by the Petitioners, Defendants therein, pursuant to the provisions of 28 U.S.C., Section 1443 in that Petitioners cannot enforce in the courts of the State of Ohio a right under Free Speech and Press Provisions of the Constitution of the State of Ohio in that

(a) Respondent-Plaintiff in the said state court action has brought a Petition to close Petitioners' business which is dissemination of sexually explicit materials which are presumptively protected under the First Amendment of the Constitution of the United States and the Free Speech and Press Provisions of the Constitution of the State of Ohio, to willing adults only under

upon the sensibilities of persons unwilling to view them and without "pandering" in the Ginzburg sense;

(b) Said Complaint of Respondent is based on the allegation in the Respondent's Complaint that the Cinema I Theatre operated by Petitioners herein William H. Dakota, et al at premises located at 69 Public Square, Lima, Ohio is a "nuisance."

3. Said action is also removable pursuant to the provisions of 28 U.S.C., Section 1443 in that

(a) Petitioners cannot enforce in the courts of the State of Ohio rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States to operate their business, which is the dissemination of sexually explicit materials which is presumptively protected under the First Amendment to the Constitution of the United States;

(b) The Court of Common Pleas of Allen County has in the recent past been utilized by the State of Ohio to curtail the exercise of First Amendment freedoms in the guise of abating a nuisance. There is every reason to believe that the procedures employed by Respondent herein acting by and through Prosecutor Lawrence S. Huffman of Allen County will be upheld by the Supreme Court of Ohio, although procedural safeguards to insure that materials entitled to the protection of the First Amendment to the Constitution of United States are not present in the Ohio Nuisance Statutes.

4. Petitioners show that they are alleged to have disseminated obscene materials, but Petitioners show further that there has been no final adjudication of a violation of the Ohio obscenity laws involving Petitioners.

5. Petitioners show that local prejudices have been so inflamed by that court's actions and actions and statements of the Prosecutor of Allen County, that it will be impossible for them to protect their First Amendment rights in the Court of Common

6. Said action is also removable pursuant to 28 U.S.C., Section 1441 (b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treatises or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C., Section 1343 to redress violations of the Civil Rights Act against Petitioners, to-wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioners reallege their allegations in paragraph 3 (a) and 3 (b) and paragraphs 4 and 5 and incorporate them as paragraph 6 (b) hereof.

7. Petitioners file herewith a bond with good and sufficient surety conditioned as provided by 28 U.S.C., Section 1446 (d) that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioners pray that the action now pending agains them in the Court of Common Pleas of Allen County, docket number 72 Civ-0326 be removed to this court for the reasons set out hereinbefore.

Respectfully submitted,

Ted Iorio

Gilbert Deitch
Attorneys for Petitioners

STATE OF OHIO)
)SS:
COUNTY OF LUCAS)

I, Ted Iorio, have read the foregoing and say that the above is true as I verily believe.

-4-

Sworn to and subscribed before me in my presence this day of December, 1972.

Notary Public

CERTIFICATION

This is to certify that a copy of the foregoing has been mailed this day of December, 1972 to Lawrence S. Huffman, Prosecuting Attorney for Allen County, Ohio, Lima, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
FOR THE WESTERN DIVISION

State of Ohio, ex rel Lawrence S. Huffman

Respondent

-vs-

William H. Dakota, et al

Petitioners

C 72-444

Civil Action No.

NOTICE OF REMOVAL

C 72-445

To: Robert H. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To: Lawrence S. Huffman
Prosecuting Attorney
127 N. Prospect Street
Lima, Ohio 45802

You, and each of you, are hereby notified that on the 11th day of December, 1972 William H. Dakota filed in the District Court for the Northern District of Ohio, Western Division a Petition for Removal of Cause No. 72-Civ-0126 in the Court of Common Pleas of Allen County and entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff vs William H. Dakota, et al, Defendants.

Ted Iorio

Dated this 11th day of December, 1972

STATE OF OHIO)
)SS:
COUNTY OF LUCAS)

I, Ted Iorio, being first duly sworn say that the foregoing notice and copy of petition for removal have been hand delivered to Robert H. Dunlap, Clerk of Courts, Allen County Court House, Lima, Ohio and Lawrence S. Huffman, Prosecuting Attorney, 127 N. Prospect Street, Lima, Ohio this 11th day of December, 1972.

Sworn to and subscribed before me in my presence this 11th day of December, 1972.

Notary Public

JUDY M. NAULT
Notary Public
My Commission expires

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN	:	
RESPONDENT	:	CASE NO. C 72-445
-vs-	:	MOTION TO REMAND
WILLIAM H. DAKOTA, et al	:	
PETITIONERS	:	

.. ..

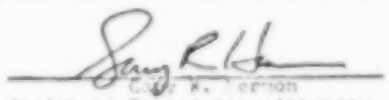
Respondent respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a civil action within 28 U.S.C. Section 1343; and

3. Petitioners can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

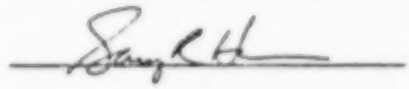
Respondent further moves the Court for an order directing petitioners to pay to respondent all expenses and disbursements incurred by respondent by reason of the removal proceedings.



Gary R. Norton
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 545, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the foregoing Motion to Remand was mailed by regular U. S. Mail this 15TH day of December, 1972, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio 43609, and Gilbert Deitch, Suite 2305, 1175 Peachtree Street NE, Atlanta, Georgia 30309, attorneys for petitioners.



IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN	:	
RESPONDENT	:	CASE NO. C 72-445
-vs-	:	
WILLIAM H. DAKOTA et al	:	MEMORANDUM IN SUPPORT OF MOTION TO REMAND
PETITIONERS	:	
	:	

In their petition for removal, petitioners contend that the suit initiated in the Court of Common Pleas of Allen County, Ohio, is a civil action which may be removed to a Federal District Court pursuant to 28 U.S.C. Sections 1441 (B) and 1443. With regard to petitioners' contention that 28 U.S.C. Section 1443 may be relied upon to remove the state action to the Federal District Court, the decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case #C72-28 in the United States District Court for the Northern District of Ohio, Western Division is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

The Court, beginning at page 6 of said opinion and order, discussed the question of Federal jurisdiction under 28 U.S.C. 1443 as it related tothe removal of a state action brought under chapter 3767 of the Ohio Revised Code to the Federal District Court. The Court specifically found that the state action could not be removed to the Federal District Court pursuant to 28 U.S.C. 1443. Additional discussion of this contention by the petitioners would seem to be unnecessary.

Petitioners attempt to invoke the provisions of 28 U.S.C. 1441 (B) which provides as follows:

> "Any civil action of which the District Courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States, shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

Petitioners contend that 28 U.S.C., Section 1343 specifically creates the original jurisdiction of the federal district court, thus, triggering the removable provisions of Section 1441 (B) at paragraph 6(A) of Petitioners' Petition for Removal -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to-wit, a denial of their rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States."

Petitioners have carefully couched the above stated allegation in terms clearly intended to fit within the provisions of subparagraph (3) of Section 1343. Subparagraph (3) grants original jurisdiction to federal district courts of any civil action commenced "to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

To paraphrase petitioners' contention, it is claimed that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates petitioners' constitutional right of free

speech. The record which is available to this Court reveals to the contrary.

Respondent filed a Complaint in the Common Pleas Court of Allen County, Ohio, alleging the existence of a public nuisance at the location known as #69 Public Square, Lima, Ohio; it was further alleged that the public nuisance was the continuous exhibition of obscene motion picture films at said location for which a preliminary and permanent injunction was sought by Respondent.

After an adversary hearing the Common Pleas Court of Allen County, Ohio, on October 24, 1972, issued a temporary injunction, a copy of said Order being attached hereto, marked Exhibit B, and incorporated by reference.

On November 30, 1972, after a hearing, the Common Pleas Court granted a permanent injunction finding that obscene motion picture films had been continuously exhibited at #69 Public Square, Lima, Ohio, and, in accordance with the mandatory provisions of Section 3767.06 of the Revised Code of Ohio, ordered the premises in which the nuisance persisted closed for a period of one year unless the defendant-owners of the realty fulfilled the requirements provided in Revised Code Section 3767.04. A copy of the Court's order is attached hereto, marked Exhibit C and incorporated by reference.

On December 1, 1972, Judge Nicholas Walinski in Case No. C72-432 entitled Pursue Ltd. v. Lawrence S. Huffman, et al, in the United States District Court for the Western District of Ohio, Western Division, granted a temporary restraining order temporarily staying the Common Pleas Court order granted on November 30, 1972, except insofar as any order which may apply

to films that have previously been declared obscene in a prior adversary hearing. (A copy of the temporary restraining order is attached hereto, marked Exhibit D and incorporated by reference). In effect, the temporary restraining order temporarily modified the order of the State Court.

Respondent in a good faith attempt to comply with the federal court order filed on December 4, 1972, a motion in the state case requesting a prior adversary hearing, a copy of which is attached hereto, marked Exhibit E and incorporated by reference. A similar motion was filed thereafter by Respondent which is, also, attached hereto, marked Exhibit F and incorporated by reference.

On December 11, 1972, the day prior to the hearing date set by the Allen County Common Pleas Court to view the motion picture films in a prior adversary hearing to determine whether said films were or were not obscene, Petitioners filed their Petition for Removal, thus, blocking the procedural vehicle deemed by this Court to be the proper method of enforcing the state court order.

Respondent submits that the Petition for Removal is really nothing more than a sham tactic designed to delay Respondent's efforts to abate the exhibition of obscene motion picture films as a public nuisance in the state court.

How can petitioners logically argue that enforcement of Chapter 3767 of the Ohio Revised Code, which has been unequivocally declared constitutional by this Court in Grove Press, Inc. v. Flask, 325 F. Supp. 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue Ltd. v. Lawrence S. Huffman, supra, is in violation of law and denies petitioners constitutional right of free speech. Indeed, if the Court is so inclined, Respondent challenges

Petitioners to exhibit to this Court the motion picture films being exhibited at the premises enjoined so that this Court might determine whether said films are entitled to First Amendment protection.

CONCLUSION

Petitioners have failed to allege any authority for the position that the State Civil action is an action removable under federal law. The appropriate step to be taken by this Court would be to acknowledge that it does not have jurisdiction over this action pursuant to 28 U.S.C., sections 1441 or 1443; that defendants can effectively and adequately enforce their First Amendment rights to freedom of speech in the State Court action and, sua sponte, remand this civil action to the State Court, and since the removal was a wrongful order, defendants to pay the costs both in this Court and in the State Court.

Respectfully submitted,

Gary R. Huffman
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that the foregoing Memorandum in Support of Motion to Remand was mailed by regular U. S. Mail this 15th day of December, 1972, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio, 43609, and Gilbert Deitch, Suite 2005, 1175 Peachtree Street NE, Atlanta, Georgia 30309, attorneys for petitioners.

FILED
DEC 19 9 47 AM '72

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN	:	
RESPONDENT	:	CASE NO. C72-445
-vs-	:	MOTION FOR
WILLIAM H. DAKOTA, et al	:	IMMEDIATE HEARING
PETITIONERS	:	
	:	

.. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil Procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Huffman
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR RESPONDENT

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND.

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material

part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On December 1, 1972, this Court issued a temporary restraining order in effect modifying the Common Pleas Court Order and requiring the State Court to hold a prior adversary hearing on obscenity prior to effectively restraining the exhibition of such film. On December 4, the Respondent filed a motion for such a prior adversary hearing and shortly thereafter filed a similar motion which was scheduled for hearing in the State Court for December 12, 1972. On December 11, 1972, the day prior to the State Court hearing which had

been scheduled in compliance with the Federal Court Order Petitioners filed their Petition for Removal herein. Respondent submits that the petition for removal is really nothing more than a sham tactic designed to delay Respondent's efforts to abate the exhibition of obscene motion picture films as a public nuisance in the State Court utilizing those procedures outlined by the Federal Court in a previous temporary restraining order.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence, and the matter is pressing. Unless this Court orders an immediate hearing on Respondent's Motion to Remand, Respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Assistant Prosecuting Attorney
Attorney for Respondent

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing with attached Memorandum was mailed by regular U. S. Mail this 13th day of December, 1972, to Ted Ioria, 448 South Hawley Street, Toledo, Ohio, 43609 and Gilbert Dutch, Suite 2005, 1170 Peachtree Street NE, Atlanta, Georgia 30309, attorneys for Petitioners.

DESIGNATION

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

FILED
DEC 11 9 35 AM '72

PURSUE, LTD., a Delaware Copr.,	)	No. C 72-432
Plaintiff	)	Requesting Judge: Honorable Nicholas J. Walinski Northern District of Ohio
v.	)	
	)	District Judge: Honorable Don J. Young
LAWRENCE S. HUFFMAN, etc., et al.,	)	Northern District of Ohio
	)	Circuit Judge: Honorable
Defendants.	)	Anthony J. Celebrezze

Having been notified by the requesting judge shown above, that the complaint in the above entitled action is one required by an Act of Congress to be heard and determined by a District Court of three Judges, I, Harry Phillips, Chief Judge of the Sixth Circuit, hereby designate the three judges named above to constitute the said Court and to hear and determine this action in accordance with 28 U. S. C. § 2284.

This designation and composition of the three judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three judge rather than a one judge court. This is a matter best determined by the three judge court.

Dated at Cincinnati, Ohio, this 6th day of December 1972.

/s/ Harry Phillips

CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., etc.,	)	
	)	
Plaintiff,	)	No. C 72-432
	)	
-vs-	)	
	)	
LAWRENCE S. HUFFMAN, etc., et al.,	)	ORDER
	)	
Defendants.	)	

• • •

This cause came to be heard on a complaint filed pursuant to 42 U.S.C., § 1983, and 28 U.S.C., § 1343(3),(4); 28 U.S.C., §§ 2281 and 2284.

Having come to the attention of the Court that the parties have agreed that an amended complaint will be filed and that defendant shall have an extension of time until January 6, 1973, within which to file an answer to that pleading as amended, the time within which the answer is required pursuant to Rule 12(a), Federal Rules of Civil Procedure, is hereby extended to the above-mentioned date.

It appearing to the Court that expeditious handling of the instant suit requires the submission of opening briefs prior to convening a three-judge court, pursuant to 28 U.S.C., § 2284, it is

ORDERED that the parties herein file such briefs in support of their respective positions as they might deem helpful to the Court in the consideration of this case. Said briefs to be filed on or before January 15, 1973.

UNITED STATES DISTRICT JUDGE

Toledo, Ohio

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation	:	
PLAINTIFF	:	CASE NO. C 72-432
-vs-		
LAWRENCE S. HUFFMAN et al	:	STIPULATION FOR LEAVE TO PLEAD
DEFENDANT	:	
	:	

.. ..

We, the attorneys for the respective parties, do hereby stipulate that the plaintiff may file an amended complaint instanter and that the defendants, Lawrence S. Huffman and Edward L. Fair may plead or move to the amended complaint on or before fourteen (14) days from the date of the filing of the same and that the Court may enter an Order accordingly; notice by the Clerk being hereby waived.

Approved:

U. S. District Judge

/S/ Ted Iorio per telephone agreement of 12/21/72

and

/S/ Gilbert H. Deitch per telephone agreement of 12/21/72

ATTORNEYS FOR PLAINTIFF

ATTORNEY FOR DEFENDANTS, LAWRENCE S. HUFFMAN and EDWARD L. FAIR

Appendix M

Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al., C72-432 (Being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Notice of Filing of Amendments, filed Dec. 29, 1972 3

Amendments to Complaint, filed Dec. 29, 1972 4-8

Answer to Complaint and Amendments, filed Jan. 5, 1973 (Less Exhibit A) 9-15

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation - versus - LAWRENCE S. HUFFMAN, et al	No. C 72-432 NOTICE

PLEASE TAKE NOTICE, that the within is a copy of the Amendments to Complaint filed in this action as a matter of course, pursuant to Rule 15(a), Federal Rules of Civil Procedure, on the _____ day of December, 1972.

GILBERT H. DEITCH, Esquire
Suite 2005
One Hundred Colony Square
1175 Peachtree Street N.E.
Atlanta, Georgia, 30309
(404) 892-8890

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation Plaintiff - versus - LAWRENCE S. HUFFMAN, et al Defendants	No. C 72-432 AMENDMENTS TO COMPLAINT

Pursuant to Rule 15(a), Federal Rules of Civil Procedure, Plaintiff files herein the following amendments to its Complaint:

1. After Paragraph 2:

This is also a civil action whereby Plaintiff prays a judgment for money damages against said Defendants, jointly and severally, both in their official capacities and individually.

2. Add to Paragraph 3: and 42 U.S.C. Section 1985(3) which provides:

> (3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support

> or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

3. Amend paragraph 10 to read:

10. Upon information and belief, Lawrence S. Huffman is named as a Defendant individually and in his capacity as Prosecutor of Allen County, Ohio and as an official authorized by Ohio law to act on behalf of the State of Ohio to abate a "nuisance" pursuant to Section 3767.03 of the Ohio Revised Code.

4. Amend paragraph 11 to read:

11. Upon information and belief, Edward Fair is named as a Defendant individually and in his capacity as Sheriff of Allen Coun ty, Ohio, having cognizance of the enforcement of the state statutes and having supervisory direction over the members of the Lima Police Department.

5. Amend paragraph 12 to read:

12. The named Defendants, individually and in their official capacities only as aforesaid, are joined herein to make enforceable and binding upon them and/or their agents, servants, employees and attorneys, any temporary restraining order, preliminary and permanent injunction, declaratory judgment, money damages and/or other order that may issue by this court.

6. Amend paragraph 13 to read:

13. The Defendants and/or their agents, servants and employess have established a pattern of conduct under color of enforcement of state law and customs within the City of Lima, Ohio, of bad-faith law enforcement, under facially invalid statutes and attempting the ultimate suppression of presumptively protected materials without, to this date, ever having had any judicial determination that any of the materials disseminated by Plaintiff are, in fact, obscene in the constitutional sense, and unless restrained, Defendants and/or their agents, servants and employees will continue to engage in the unlawful activities, as well as other unconstitutional conduct that has had the effect of perpetuating a "chilling effect" upon the exercise of Plaintiff's First Amendment rights, as well as the right of interested adult citizens of the City of Lima and the State of Ohio, and of the other forty-nine states who may visit Ohio and who wish to exercise their First Amendment right to view non-obscene films.

7. After paragraph 19 add the following paragraph:

On December 1, 1972 after this Court issued a restraining order at approximately 3:00 p.m., Defendants continued their harassment of Plaintiff by serving subpoenas duces tecum upon the management of Cinema I Theatre in the case of Huffman v. Dakota, after the final judgment had been entered, to produce all the films in the possession of management of Cinema I Theatre.

8. After paragraph 4 of the prayer for relief, add the following paragraph:

That judgment be rendered herein for damages in favor of Plaintiff against Defendants, jointly and severally, in the amount of Fifty Thousand Dollars ($50,000.00).

GILBERT H. DEITCH, Esquire
Suite 2005
One Hundred Colony Square
1175 Peachtree Street, N.E.
Atlanta, Georgia, 30309
(404) 892-8890

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This _____ day of December, 1972.

GILBERT H. DEITCH, Esquire

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation	
PLAINTIFF	CASE NO. C 72-432
-vs-	
LAWRENCE S. HUFFMAN, et al	ANSWER
DEFENDANTS	

For their answer to plaintiff's complaint and amendments to complaint, defendants, Lawrence S. Huffman and Edward Fair,

FIRST DEFENSE

1. Deny paragraphs 1 to 7 of plaintiff's complaint and amendments to complaint and specifically deny the jurisdictional allegations alleged by plaintiff.

2. Deny that part of paragraph 8 of plaintiff's complaint and amendments to complaint alleging that plaintiff, Pursue, Ltd., is engaged through its agents, servants and employees in the dissemination of movies for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments; deny that said movies are presumptively protected under the First Amendment to the Constitution of the United States; and allege that said movies are obscene.

3. Deny paragraph 9 of plaintiff's complaint and amendments to complaint; allege that the materials disseminated are

are obscene.

4. Admit that part of paragraph 10 of plaintiff's complaint, and amendments to the complaint, alleging that Lawrence S. Huffman is prosecuting attorney of Allen County, Ohio, and authorized under Ohio law to act on behalf of the State of Ohio to abate a nuisance pursuant to Chapter 3767 of the Revised Code of Ohio; and denies each and every other allegation contained in said paragraph 10.

5. Admit that part of paragraph 11 of plaintiff's complaint and amendments to the complaint, alleging that Edward Fair is Sheriff of Allen County, Ohio; and denies each and every other allegation contained in said paragraph 11.

6. Deny paragraph 12 of plaintiff's complaint and amendments to the complaint.

7. Deny paragraph 13 of plaintiff's complaint and amendments to the complaint and allege that plaintiff has been and is exhibiting obscene motion picture films in Lima, Ohio, which are not entitled to First Amendment protection and, further, that acts of the defendants intended to enforce state law, to wit: Ohio Revised Code Section 3767.01 et seq., were done in reliance on decisions of the United States District Court, Northern Division, namely, Grove Press, Inc., v. Flask, 326 F Supp 574, and Marks v. Huffman et al, Case No. C 72-193, specifically finding Ohio Revised Code Sections 3767.01 et seq., constitutional, and in compliance with the temporary restraining order issued by this Court herein.

8. Move to strike paragraph 14 in its entirety for the reason that the plaintiff in William Dakota v. Sheriff Edward

Fair, Docket No. C 72-384, United States District Court, Northern Division, is not a party herein, and further, that any claim of an infringement of the constitutional rights of plaintiff William Dakota is a personal right and therefore, neither transferable or assignable; defendants, in the alternative, deny each and every allegation contained in said complaint and amendments to the complaint.

9. Deny paragraph 15 of plaintiff's complaint and amendments to the complaint, for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments; and specifically deny that the personal constitutional rights of William Dakota are assignable.

10. Deny paragraph 16 of plaintiff's complaint and amendments to the complaint for the reason that they are without knowledge or information sufficient to form a belief as to the truth of such averments.

11. Admit paragraph 17 of plaintiff's complaint and amendments to the complaint.

12. Admit paragraph 18 of the plaintiff's complaint and amendments to the complaint.

13. Deny paragraph 19 of plaintiff's complaint and amendments to the complaint, and allege that the Honorable Judge Robert M. Light did in Case No. 72 CIV 0326 in the Court of Common Pleas of Allen County, Ohio, entitled The State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al, on November 30, 1972, issue the order marked Exhibit A and attached to plaintiff's complaint; that said order contained specific findings that the continuous exhibition of obscene

motion picture films constituted a nuisance as defined by Section 3767.01(C) of the Ohio Revised Code; that the defendants named therein and all of the persons acting in concert or participation with them were permanently enjoined and restrained from conducting such nuisance; that several of the defendants named therein together with plaintiff in this action through its agents, servants, and employees, did violate the order of the state court by continuing to exhibit obscene motion picture films; and that in compliance with the order of this Court requiring a prior adversary hearing issued by way of a temporary restraining order herein on December 1, 1972, plaintiff, Lawrence S. Huffman, did on December 1, 1972, cause a subpoena duces tecum to be issued and served upon Robert Smith, a defendant in the State case, and Robert Hollis, a person acting in concert or participation with said Robert Smith, requiring production and exhibition of motion picture films in their possession for the purpose of conducting a prior adversary hearing, all in a good faith attempt to enforce the injunction issued by the State court in State of Ohio ex rel Lawrence S. Huffman v. William Dakota, et al.

14. Deny paragraph 20 of plaintiff's complaint and allege that "materials" alleged to be protected under the First Amendment are, in fact, obscene motion picture films not entitled to First Amendment protection, and further allege that the plaintiff which purports to be a corporation is not entitled to invoke protection under the First Amendment for the reason that the right of free speech is a personal right and not available to a corporation.

15. Deny paragraph 21 of plaintiff's complaint and amendments to the complaint, and allege that all acts of defendants have been in good faith and in reliance upon the decisions of the United States District Court, Northern Division, upholding the constitutionality of Section 3767 et seq., of the Ohio Revised Code, as set forth in paragraph 7 of defendant's answer herein, and in compliance with the temporary restraining order of this Court requiring a prior adversary hearing; that on December 4, 1972, the Court of Common Pleas of Allen County, Ohio, viewed the motion picture "Sexual Freedom in Denmark" but that the Court withheld making a judicial determination as to obscenity at the request of Ted Iorio, counsel for plaintiff herein, so that said counsel could present additional evidence relative to the issue of the obscenity of said film; that the Court of Common Pleas of Allen County, Ohio, withheld its decision until December 12, 1972, at which time the prior adversary hearing was to be reconvened; that on December 11, 1972, the day prior to the reconvening of the prior adversary hearing in the Allen County Common Pleas Court, Ted Iorio and Gilbert Deitch, attorneys for plaintiff herein, filed in this Court in Case No. C 72-445 entitled State of Ohio ex rel Lawrence S. Huffman v. William Dakota, et al, a petition for removal effectively terminating the jurisdiction of the Court of Common Pleas of Allen County, Ohio, in the same entitled case and in which the prior adversary hearing had been scheduled; that counsel for the plaintiffs have intentionally and wrongfully used the federal judicial process to avoid any judicial determination as to obscenity of the films by the state court; that

if there is any infringement of plaintiff's First Amendment rights arising out of the lack of any final judicial determination as to the obscenity of motion picture films, it resulted from the acts and conduct of plaintiff's counsel rather than any conduct of defendants herein; and that plaintiff's First Amendment rights are not being violated for the reason that the motion pictures exhibited by plaintiff are obscene and, further, that plaintiff, in its corporate capacity cannot avail itself of the personal right of freedom of speech as set forth in the First Amendment.

16. Deny paragraphs 22-26 of plaintiff's complaint and amendments to the complaint, and allege that plaintiff in its corporate capacity cannot avail itself of the personal right of freedom of speech as set forth in the First Amendment, that the motion picture films exhibited by plaintiff are obscene and, thus, not entitled to First Amendment protection; that the Ohio Nuisance Statutes, Section 3767.01 et seq., of the Ohio Revised Code are constitutional; and that any lawful act in furtherance of the enforcement of said Ohio Nuisance Statutes, which have been held constitutional by this Court and in compliance with the temporary restraining order issued herein cannot be deemed violative of plaintiff's constitutional rights.

SECOND DEFENSE

1. Incorporate by reference paragraphs 1-16 of their First Defense herein.

2. Move to dismiss plaintiff's complaint and amendments to the complaint for failure to state a claim upon which relief

can be granted.

THIRD DEFENSE

1. Incorporate by reference paragraphs 1-16 of their First Defense herein.

2. Allege that any acts or conduct of defendants directed at plaintiff or its agents were in good faith and in the exercise of their offices.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
ATTORNEY FOR DEFENDANTS
LAWRENCE S. HUFFMAN AND
EDWARD L. FAIR

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Answer was m..led to attorneys for plaintiff herein, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street N.E., Atlanta, Georgia, 30309, and Ted Iorio, 435 South Hawley Street, Toledo, Ohio 43609, on the 4th day of January, 1973, by regular U. S. Mail.

Lawrence S. Huffman

Appendix N

Trial Brief of Defendants *Huffman et al. in Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al.*, C72-432) (Being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix:	Page
Point Number 3 of Trial Brief, filed Jan. 16, 1973	3-7
Affidavits of Deputy Sheriff Hawk (Incorporated in Trial Brief) Re viewing of "Skin Flick Madness" and "Okie Maid" on Dec. 7, 1972	8
Re viewing of "The Honeymoon Is Over" and "Brit Blazer" on Dec. 14, 1972	9
Re viewing of "Bells, Books and Balls" and "Mother Knows Best" on Dec. 30, 1972	10
Re viewing of "The Hedonist-Hypnotist" and "Documentary of a Madam" on Jan. 10, 1972	11

An assignment of the lease may transfer the lessee's entire interest in the demised premises for the unexpired term of the original lease to the assignee, but, clearly, the personal right of the lessee to freedom of speech is a constitutional right, and thus, non-assignable. The constitutional rights claimed to be infringed upon, therefore, must be those of the assignee-plaintiff, Pursue, Ltd., and not that of the assignor-lessee, William H. Dakota.

Defendant contends that Pursue, Ltd., which represents itself to be a Delaware Corporation is not a "person" within the meaning of that term as used in the Fourteenth Amendment. The Fourteenth Amendment provides in part that no State shall deprive "any person of life, liberty, or property, without due process of law." In Northwestern National Life Insurance Co., v. Riggs, 203 US 243, 27 S. Ct. 126 (1906) the Supreme Court held that corporations cannot be deprived of "liberty" under the Fourteenth Amendment but that the term "liberty" applied to natural persons only. Even if "person" could be construed to include corporations, defendants contend that Sections 3767.01 et seq., of the Ohio Revised Code provide procedural devices which were available to plaintiff in the State court on the date of the alleged assignment and are still available to litigate those questions raised in this suit. Plaintiff's claim, therefore, that its liberty has been deprived without due process of law is without merit.

POINT NUMBER THREE

Defendants contend that plaintiff must establish that defendants' attempts to enforce Sections 3767.01 et seq., of the Ohio Revised Code are (1) in bad faith, (2) harassment, and

(3) cause great and immediate irreparable injury.

Even if Sections 3767.01 et seq., of the Ohio Revised Code were unconstitutional on their face, the Supreme Court has consistently held, as recently as February, 1971, that "possible unconstitutionality of a statute on 'its face' does not of itself justify injunction against good faith attempts to enforce it" absent bad faith, harassment, great and immediate irreparable injury, or other extraordinary circumstances. Younger v. Harris, 91 S. Ct. 746, 755.

Defendants contend that the nuisance suit was initiated in the State court in reliance upon the decisions of the United States District Court, Northern District in Grove Press, Inc., v. Flask, 326 F. Supp 574, and Marks v. Huffman, et al, Case C 72-193 (See Appendices O and P) upholding the constitutionality of said statutes; that enforcement of the State Court's orders issued in the state nuisance action was in good faith and in reliance upon the constitutionality of the statutory procedures of said statutes; and that when ordered by the Federal District Court to provide prior adversary hearings to determine the obscenity of motion picture films at the Cinema I Theater, defendant, Lawrence S. Huffman, did in good faith attempt to comply with said federal court order and still enforce the state court order by requesting such an adversary proceeding. Plaintiff cannot prove, as no such proof exists, that defendants ever prosecuted the state action in bad faith with no expectation of obtaining a valid conviction.

The "harassment" element as envisioned by the Supreme Court in Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, is totally absent in this cause.

The evidence will demonstrate: (1) that defendants have not "harassed" plaintiff or its agents within the meaning of that term as enunciated by the Court in Dombrowski v. Pfister, 380 U.S. 479, supra, and later cases; (2) that defendants have not undertaken civil and criminal prosecution against plaintiff and his agents "in bad faith and without hope of obtaining a valid conviction"; (3) that plaintiff has not suffered "great and immediate irreparable injury" as envisioned by the Court in Younger v. Harris, supra, and other pertinent Supreme Court decisions.

Dombrowski, supra, presented the Court with a factual pattern of a continuous series of physical acts and threats committed by state officials against the plaintiffs therein. This continuous pattern of acts and threats became the framework of the "harassment" requirement for federal intervention under the Civil Rights Act where the "harassment" was designed not for good faith prosecution with an expectancy of conviction, but in "bad faith and without hope of obtaining a valid conviction" in the State court.

In Dombrowski, supra, notwithstanding a state court order quashing warrants and suppressing evidence, plaintiffs offered to prove threats of additional prosecution under the same statute by the State obtaining indictments using copies of the illegally seized evidence and conducting public hearings at which copies of the illegally seized documents were used.

In the present case defendants believe the evidence will show that no conditions exist whatsoever from which one might infer that defendants did not expect a valid conviction. None of the elements present in Dombrowski, supra, or even analagous elements can be found in this case.

In order for plaintiff to prevail herein plaintiff must establish that the danger of irreparable injury is both great and immediate. Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714; Younger v. Harris, supra.

"Certain types of injury in particular, the cost, anxiety, and inconvenience of having to defend against a single prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by defense against a single criminal prosecution." Younger v. Harris, supra, p. 751.

Plaintiff will undoubtedly argue that a substantial loss of or impairment of freedom of expression will occur if the state court order is not dissolved or modified to the extent that enforcement of state court's order is unenforceable, and this loss or impairment of freedom of expression is his irreparable injury.

A close examination of the facts of the present case, however, reveal to the contrary. In Roth v. United States, 354 U.S. 476, 485, 77 S. Ct. 1304, 1309, 1L E. 2d 1498 (1957), the Supreme Court stated: "We hold that obscenity is not within the area of constitutionally protected speech or press." Clearly, Roth remains the law of the land. Therefore, if the films exhibited at the Cinema I Theater by plaintiff are obscene, plaintiff cannot claim either a loss or impairment of freedom of expression as irreparable injury since obscenity is not within the area of constitutionally protected expression.

Attached hereto as Appendices Q, R, S and T are affidavits of a deputy sheriff who has viewed motion picture films exhibited by plaintiff since this Court ordered the re-opening of the

Cinema I Theater.

The attached affidavits clearly show that plaintiff has continuously exhibited obscene motion picture films at the location already deemed a public nuisance by the State court.

Plaintiff has filed a spurious lawsuit in the federal district court without pursuing any remedy available in the State court for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition. Defendants contend that plaintiff's conduct is a flagrant abuse of the federal court system.

POINT NUMBER FOUR

Defendant Lawrence S. Huffman contends that plaintiff's complaint and amendments to the complaint do not state a cause of action upon which relief can be granted for the reason that defendant is immune from suit as a matter of law by reason of his position as prosecuting attorney of Allen County, Ohio, and the quasi-judicial nature of his acts.

This question was squarely placed before this Court in Robert Boyd v. Lawrence S. Huffman, et al, in Civil No. C 70-296. In that case the prosecuting attorney prepared and assisted in the execution of a search warrant which resulted in the seizure of an obscene motion picture film without first conducting a prior adversary hearing as to the film's obscenity. Judge William J. Young's opinion is attached hereto as Appendix U. At page 3 of his opinion Judge Young stated: "It has long been recognized in this Circuit that a prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action as that which protects a judge acting within his jurisdiction.

THIS REPRODUCTION FAITHFULLY PROJECTS ORIGINAL COPY WHICH WAS ITSELF UNREADABLE.

AFFIDAVIT

STATE OF OHIO
SS:
COUNTY OF ALLEN

Fred H. Hawk, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio, that on December 7, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Skin Flick Madness" and "Okie Maid".

Affiant says that the credits of "Skin Flick Madness" showed that it was produced by "Buckit Films", that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the various sexual acts depicted in the stag fil and engaging in sexual activity themselves during the stag film, and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio,sexual intercourse, lesbianism and cunnilingus.

Affiant says that the second feature was entitled "Okie Maid" which lasted approximately 50 minutes, that the general theme of the movie centered about the sexual activities of three men who lived together in a mountain shack, and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

Further affiant saith not.

Fred H Hawk

Sworn to before me and subscribed in my presence, this 15th day of January, 1973.

Notary Public

AFFIDAVIT

STATE OF OHIO
SS:
COUNTY OF ALLEN

Fred H. Hawk, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio, that on December 14, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "The Honeymoon Is Over" and "Brit Blazer".

Affiant says that the first feature he viewed was entitled "The Honeymoon Is Over" which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism and fellatio.

Affiant further says that he viewed the second motion picture entitled "Brit Blazer" which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

Further affiant saith not.

Fred H Hawk

Sworn to before me and subscribed in my presence, this 15th day of January, 1973.

Notary Public

THIS REPRODUCTION FAITHFULLY PROJECTS ORIGINAL COPY WHICH WAS ITSELF UNREADABLE.

AFFIDAVIT

STATE OF OHIO
SS:
COUNTY OF ALLEN

Fred H. Hawk, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio, that on December 30, 1972, he paid $3.00 and was admitted to the Cinema I Theatre, #67 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Bells, Books and Balls" and "Mother Knows Best".

Affiant says that the first feature he viewed was entitled "Bells, Books and Balls" which lasted approximately one hour; that there was no general theme of the movie ascertainable by affiant, and that the movie contained several explicit scenes of nude males and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

Affiant says that he viewed the second feature entitled "Mother Knows Best" which lasted approximately one hour, that the general theme of the movie centered about the sexual adventures of a mother and daughter travelling to the west coast, that the film contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, lesbianism and cunnilingus.

Further affiant saith not.

Fred H Hawk

Sworn to before me and subscribed in my presence, this 15TH day of January, 1973.

Notary Public

AFFIDAVIT

STATE OF OHIO
SS:
COUNTY OF ALLEN

Fred H. Hawk, being first duly sworn, says that he is a Deputy Sheriff of Allen County, Ohio, that on January 10, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #67 Public Square, Lima, Ohio; and that he viewed two motion picture films entitled "The Hedonist-Hypnotist" and "Documentary of a Madam".

Affiant says that the first motion picture he viewed was entitled "The Hedonist-Hypnotist" which lasted approximately one hour, that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

Affiant says that he viewed the second feature entitled "Documentary of a Madam" which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

Further affiant saith not.

Fred H Hawk

Sworn to before me and subscribed in my presence, this 15TH day of January, 1973.

Notary Public

Appendix O

Pursue Ltd., a Delaware Corporation v. Lawrence S. Huffman in his capacity as Prosecutor, Allen County, Ohio et al., C72-432 (being a Civil Rights Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Motions to Dissolve Temporary Restraining Order and to Dismiss, filed Feb. 12, 1973. 3

Memorandum in Support of Motions to Dismiss and Dissolve T.R.O. (Less Exhibits A, B and C) which appear at Appendices P, Q and R), filed Feb. 12, 1973. 4-8

Motion for Immediate Hearing. 9

Memorandum in Support of Motion for Immediate Hearing, filed Feb. 12, 1973 10-12

William H. Dakota v. Huffman, et al., C72-445, (Being a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Second Motion for Immediate Hearing, filed on Feb. 12, 1973, on Motion to Remand, filed Dec. 18, 1972. 13-16

Additional Memorandum, filed Mar. 12, 1973, in Support of Motion to Remand. 17-25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD., et al	:	
Plaintiff	:	CASE NO. C 72-432
-vs-	:	MOTIONS TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS.
LAWRENCE S. HUFFMAN, et al	:	
Defendant	:	
	:	

.. ..

Defendants, Lawrence S. Huffman and Edward L. Fair, move the Court for an Order dissolving the Temporary Restraining Order issued hereon on December 1, 1972, for the reason that the Temporary Restraining Order was issued without notice ex parte and has exceeded 10 days without an extension in accordance with law, and further, for the reason that Plaintiff cannot show that a state court order prohibiting exhibition of motion pictures at the premises known as Cinema I Theatre, #69 Public Square, Lima, Ohio, causes great and immediate irreparable injury, loss or damage to plaintiff as evidenced by the attached affidavits and time-motion studies in Defendants' Memorandum.

Defendants, Lawrence S. Huffman and Edward L.Fair, further move the Court for an Order dismissing Plaintiff's Complaint for the reason that it is a sham pleading brought in bad faith and to permit further cognizance thereof would only perpetuate the fraud already thrust upon the Court by Plaintiff and the resultant gross abuse of the federal judicial process, all as evidenced by the attached exhibits in Defendants' Memorandum.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney, Allen County, Ohio

Gary R. Herman
Assistant Prosecuting Attorney

ATTORNEYS FOR DEFENDANTS,
LAWRENCE S. HUFFMAN AND EDWARD L. FAIR

MEMORANDUM

Defendants contend the temporary restraining order issued herein on December 1, 1972, should be dissolved for the reason that it was issued without notice ex parte and has exceeded 10 days without an extension in accordance with law.

Rule 65(b) of the Federal Rules of Civil Procedure provides in part: "Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

Clearly, the temporary restraining order issued herein was without notice; indeed, the order states "that the plaintiff has made an attempt (my emphasis) to notify the defendants." As a matter of fact, when defendants were notified that suit had been filed against them, Gary R. Hermon, one of the counsel for defendants, called the Court and spoke to one of the law clerks of the Court. At that time counsel specifically requested that he be notified as he wished to appear if the Court was going to consider plaintiff's application for a temporary restraining order. Counsel was informed that he would be so notified; counsel for defendants learned days later that the order had been issued ex parte and he did not receive notice.

The record shows that over 60 days have elapsed since issuance of said order. The record further shows the order has not been extended nor have defendants consented to any extension thereof.

Defendants are entitled to dissolution of the temporary restraining order on this basis alone.

Further, the basis for the issuance of said order, to wit: "to prevent great and immediate irreparable harm to the plaintiff" as alleged

by plaintiff was false and fraudulent. Attached hereto and incorporated by reference are Exhibits A, B, and C which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at the Cinema I Theatre, #69 Public Square, Lima, Ohio, for three successive weeks, January 10 - 30, 1973, together with photographic reductions of time-motion studies of said motion picture films. (Taped recordings have been made of said films and will be available at the hearing of defendants' motions.) (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein.)

The gist of plaintiff's contention that plaintiff would sustain great and immediate irreparable harm was that defendants would actively seek through the state court to interfere with the exhibition of "constitutionally protected" motion picture films at the Cinema I Theatre. Plaintiff's representations to the Court were false and fraudulent as evidenced by the attached exhibits. Plaintiff has consistently and continuously exhibited obscene motion picture films at said theatre, therefore, plaintiff cannot sustain the great and immediate irreparable injury which must be the basis of the temporary restraining order as obscenity is not constitutionally protected. Since plaintiff cannot suffer the requisite injury, plaintiff cannot be entitled to the relief sought and the temporary restraining order must be dissolved.

Defendants further contend that this Court can and should dismiss plaintiff's complaint for the reason that it is a sham pleading brought in bad faith; that it is a fraudulent action which, when combined with the petition for removal filed with this Court in Case No. C 72-445, constitutes a gross abuse by plaintiff of the federal judicial process.

"A sham pleading is defined as one that while in good form is

is false in fact, or one good in form but false in fact and not pleaded in good faith." 61 Am Jur 2d, Pleading, Section 26, page 474.

"It has always been held that by virtue of its inherent power, the court has authority by summary means to prevent an abuse of its processes and peremptorily to dispose of causes of action or defenses that are sham, frivilous, or wholly vexatious." 61 Am Jur 2d, Pleading, Section 211, page 631.

As related earlier in this Memorandum, plaintiff's basis for obtaining a temporary restraining order, indeed, the basis for the entire lawsuit is that defendants have in the past and will continue in the future to interfere with the presentation of "constitutionally protected" motion picture films at the Cinema I Theatre, 469 Public Square, Lima, Ohio, by plaintiff. While plaintiff's complaint is "in good form", it is "false in fact" as evidenced by Exhibits A, B, and C. Plaintiff has used the federal judicial process fraudulently (1) by filing a complaint claiming that it was exhibiting "constitutionally protected" films; (2) by obtaining a temporary restraining order on the same basis and falsely representing a fear of great and immediate irreparable harm which, of course, can't be sustained since the films are obscene; and (3) by filing a sham petition for removal in this Court in Case No. C 72-445 thereby terminating the jurisdiction of the state court when defendant Huffman attempted to comply with this Court's order and afford plaintiff a prior adversary hearing as to obscenity.

Plaintiff's complaint was not brought in good faith as evidenced by the continuous exhibition of obscene films and the filing of the petition for removal one day before the prior adversary hearing to determine obscenity in the state court under the guidelines of the federal order.

Defendants need not dwell upon the obscenity of the motion picture films exhibited by plaintiff at the subject premises. Exhibits A, B, and C speak for themselves. The depths to which the pornography peddlers like

plaintiff have fallen in the area of obscene motion pictures is perhaps best illustrated by the language used by the Court of Appeals for Lucas County in State ex rel Ewing v. "Without a Stitch", 24 O App 2d 137 at page 112:

> By any test, medium core, hard core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film (Without a Stitch) was obscene."

The film "Without a Stitch" couldn't qualify as a cartoon at the Cinema I Theatre where plaintiff daily exhibits obscene films many times over more sexually explicit.

To permit plaintiff to persist in such conduct, and more importantly, to abuse the federal judicial process in the manner above described, while it continues to commercially exploit sex under the pretense of freedom of expression would be contrary to law, an injustice to the people of the State of Ohio in whose name the state action was brought, and a reward to those who clearly are violating the law and knowingly abusing the federal court system for so doing.

Plaintiff's suit is a sham as demonstrated by its conduct, and, accordingly, should be dismissed.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786

and

Gary R. Herman
Assistant Prosecuting Attorney
Allen County, Ohio

ATTORNEYS FOR DEFENDANTS
LAWRENCE S. HUFFMAN and EDWARD L. FAIR

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motions to Dissolve Temporary Restraining Order and to Dismiss was mailed to regular U. S. Mail this ____ day of February, 1973, to attorney for Plaintiff, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street, N.E., Atlanta, Georgia, 30309.

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

PURSUE, LTD.,	:	
Plaintiff	:	CASE NO. C 72-432
-vs-	:	
Lawrence S. Huffman et al	:	MOTION FOR IMMEDIATE HEARING ON MOTIONS TO
Defendants	:	DISSOLVE TEMPORARY RESTRAINING ORDER AND
	:	TO DISMISS.
	:	

.. ..

Defendants respectfully move the court pursuant to Rule 6(d) of the Federal Rules of Civil Procedure for an immediate hearing on defendants' motions to dissolve temporary restraining order and to dismiss which are filed herewith and for leave to serve a copy of said motions and a notice of the hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this motion as is clearly set forth in the Memorandum in support of this motion, attached hereto and made a part hereof.

Respectfully submitted,

_____
Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0736

and

_____
Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

ATTORNEYS FOR DEFENDANTS

MEMORANDUM

This motion is being filed pursuant to Rule 6(d) of the Federal Rules of Civil Procedure, which provides, in material part, as follows:

> "A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order for cause shown shall be made on ex parte application . . . ."

On November 30, 1972, after two prior adversary hearings the Allen County Court of Common Pleas issued a permanent injunction and, having made a finding that a nuisance existed at the premises located at #69 Public Square, Lima, Ohio, ordered said premises closed as required by the pertinent Ohio statutes.

On December 1, 1972, plaintiff filed his complaint herein and obtained without notice an ex parte a temporary restraining order. Plaintiff's suit was predicated upon a contention that enforcement of the state court's order effectively curtailed plaintiff's First Amendment rights, and that by reason thereof, plaintiff sustained great and immediate irreparable injury.

Defendants represent to this Court that plaintiff has used the Court to its own ends and has falsely and fraudulently filed its Complaint, obtained a temporary restraining order, and filed a petition for removal for the sole purpose of commercially exploiting the dominant sexual theme of motion pictures exhibited by plaintiff in the subject premises, to the great and immediate irreparable harm to the citizens of the State of Ohio in whose name defendant Huffman brought the State action.

In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B, and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at the subject premises for three successive weeks, January 10-30, 1973, together with

photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plaintiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).

Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been placed in a position of making an order based upon a contention of great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff.

To permit plaintiff to persist in such conduct is to reward an entity commercially exploiting sex under the pretense of freedom of expression and, at the same time, punish the people of the State of Ohio by thwarting good faith State prosecution under the Ohio nuisance statutes brought on behalf of the people of the State of Ohio.

Defendants submit that plaintiff's complaint and the subsequent petition for removal filed in this Court are really nothing more than a sham tactic designed to delay and, hopefully, destroy defendants' efforts to abate the nuisance at the Cinema I Theatre, #69 Public Square, Lima, Ohio, said location having been previously adjudicated a nuisance after prior adversary proceedings and continuing to be a nuisance by virtue of the sham actions brought by plaintiff in this Court.

Defendants further submit that time is of the essence as plaintiff persists in exhibiting obscene motion pictures at the subject premises; and that unless this Court orders an immediate hearing on defendants'

motions to dissolve temporary restraining order and to dismiss, defendants' rights to proceed in the State Court and insure abatement of the subject premises as a public nuisance will be substantially prejudiced and a great injustice will thereby result.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion was mailed by regular U. S. Mail this ____ day of February, 1973, to attorney for plaintiff herein, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street, Atlanta, Georgia, 30309.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN	:	
Respondent	:	CASE NO. C 72-445
-vs-	:	
WILLIAM H. DAKOTA et al	:	MOTION FOR IMMEDIATE HEARING ON MOTION TO REMAND.
Petitioners	:	

.. ..

Respondents respectfully move the Court pursuant to Rule 6(d) of the Federal Rules of Civil Procedure for an immediate hearing on defendants' motion to remand filed herein on or about December 18, 1972, and for leave to serve a copy of his Motion to Remand and Notice of the Hearing thereof within five days of the time specified for the hearing.

Good cause exists for this motion as is clearly set forth in the Memorandum in Support of this motion, attached hereto and made a part hereof.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

ATTORNEYS FOR RESPONDENTS

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND.

This motion is being filed pursuant to Rule 6(d) of the Federal

Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application . . . ."

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On December 1, 1972, this Court issued a temporary restraining order in effect modifying the Common Pleas Court Order and requiring the State Court to hold a prior adversary hearing on obscenity prior to effectively restraining the exhibition of such film. On December 4, the Respondent filed a motion for such a prior adversary hearing and shortly thereafter filed a similar motion which was shceduled for hearing in the State Court for December 12, 1972. On December 11, 1972, the day prior to the State Court hearing which had been scheduled in compliance with the Federal Court Order petitioners filed their petition for removal herein. Respondent submits that the petition for removal is really nothing more than a sham tactic designed to delay respondent's efforts to abate the nuisance in the State Court utilizing those procedures outlined by the Federal Court in a previous temporary restraining order.

In support of respondent's allegations, respondent refers to Exhibits A, B, and C attached to respondent's motions to dissolve temporary restraining order and to dismiss in Case No. C 72-432 in this Court which are hereby incorporated by reference. Said exhibits are affidavits of persons who have seen the motion pictures exhibited at the subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of respondent's Motion to Remand.

The continuous exhibition of obscene motion picture films as evidenced by the aforementioned exhibits and petitioner's abuse of the federal judicial process to perpetuate a fraud upon this Court is flagrant and without precedent. Unfortunately, this Court has been used by petitioners, perhaps unwillingly, but by operation of the applicable federal statutes to effectively terminate the jurisdiction of the State Court thereby permitting the continuous commercial exploitation of sex at the subject premises under the pretense of freedom of expression. It would seem that the Court would welcome the opportunity to undo that which the operation of certain removal statutes dictate as the initial effect of filing a petition for removal, namely termination of State Court jurisdiction.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence and the matter is pressing. Unless this Court orders an immediate hearing on Respondent's Motion to Remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Respectfully submitted,

Lawrence S. Huffman, Prosecuting Attorney
Allen County, Ohio

Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio
ATTORNEYS FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing on Motion to Remand was mailed to attorney for Petitioners, Gilbert H. Deitch, Suite 2005, One Hundred Colony Square, 1175 Peachtree Street, Atlanta, Georgia, 30309, this _____ day of February, 1973, by regular U. S. Mail.

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE STATE OF OHIO ex rel	:	
RESPONDENT	:	CASE NO. C72-445
-vs-	:	
WILLIAM H. DAKOTA et al	:	ADDITIONAL MEMORANDUM IN SUPPORT OF MOTION TO REMAND.
PETITIONERS	:	

This Federal District Court lacks subject matter jurisdiction as this action is not a civil rights case within 28 U.S.C. Section 1443.

In their petition, William H. Dakota, et al, hereinafter referred to as defendants, have alleged that this United States District Court has jurisdiction over the case at hand. The defendants contend that this is a type of civil action of which the district courts of the United States have original jurisdiction under 28 U.S.C., Section 1443 (Civil Rights) and which may be removed to a federal district court pursuant to 28 U.S.C., Section 1441 (b).

With regard to the defendants' contention that 28 U.S.C., Section 1443 gives this Federal District Court jurisdiction, it is respectfully submitted that the well reasoned opinion and decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case #C72-28 in this United States District Court for the Northern District of Ohio, Western Division is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

Defendants allege that plaintiff, State of Ohio, ex rel Lawrence S. Huffman, has conspired to intimidate and harass the defendants from exhibiting such films as the local exhibitors choose. They contend that in furtherance of this conspiracy plaintiff has instituted numerous actions similar to the instant case under authority of a state statutory scheme allowing individuals to act in the place of the state attorney general or prosecutor in enforcing the public nuisance laws. Because the film owners or exhibitors first amendment rights to free speech were not found to prevail in any of the cases prior to removal to this Federal District Court, defendants argue that they cannot enforce their first amendment rights as citizens of the United States to freedom of speech and of the press in the Court of Common Pleas of Allen County, Ohio, and that, therefore, they are entitled to call upon the jurisdiction of this federal court for a final adjudication of the matter, pursuant to 28 U.S.C. Section 1443.

As the following analysis will show, this Federal Court lacks jurisdiction over the subject matter because this action is not a civil rights case within the meaning of 28 U.S.C. 1443, and removal of such case was therefore not proper.

In providing for the removal of certain civil rights cases, Section 1443 reads as follows:

> "Any of the following civil acts or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and diversion embracing the place wherein it is pending:
>
> "1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "2. For any act under color of authority derived from any law providing for equal rights, or for refusing

> to do any act on the ground that it would be inconsistent with such law." (Emphasis added)

A simple reading of this section reveals that the Court of Appeals for the Fourth Circuit was correct in describing the language of this section as "exquisite obscurity." See Baines v. Danville, 357 F. 2d 756 (4th Circ., 1966).

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed by the United States Supreme Court in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

> 1. that the right . . . is a right under any law providing for . . . equal civil rights, and
>
> 2. that petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F. 2d 595 (7th Circ., 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . .
>
> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the

> First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all."(citation omitted). Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443 (1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966), the Supreme Court held that Section 1443 (1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443 (2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that 'the First Amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within

the meaning of Section 1443(1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the First Amendment."

From Peacock it is obvious that defendants are not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish, as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F. 2d 1067, 1070 (4th Cir. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole ground cited by the defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) was that they cannot enforce in the Court of Common Pleas of Allen County, Ohio, their first amendment rights as citizens of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendants' broad contention that they cannot enforce their first amendment rights to freedom of speech in the State court

cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that they cannot enforce their first amendment rights to freedom of speech in the state courts. Because their petition for removal failed to make any showing whatever that they are being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendants are not entitled to removal of this case pursuant to 28 U.S.C., Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendants' allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441.

Defendants also contend that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in their petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendants' contention, they claim that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates their constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because the plaintiffs' action is one to abate a public nuisance; that it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F. Supp. 281, at 292, and 28 U.S.C. Section 1441 (B):

> ". . . The City derives its authority to seek an injunction against this 'nuisance' not from federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health of its citizens. . ."

And in the Grove Press, Inc. case, the Court also stated at page 292 the following:

> "Although it is likely that the alleged obscenity of 'I Am Curious --Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.
>
> "The City's prayer for an injunction in the state

courts neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this "nuisance" not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.

"The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc. v. Prince George County Cong. of Racial Eq., 221 F. Supp 541, 544 (D Md., 1963) . . .

"Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes of removing an action here pursuant to Title 28 U.S.C., Section 1441."

In the instant case, the defendants are unable to show that their First Amendment rights have not, are not, or would not be protected in the state courts. Secondly, their mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter. And finally, Chapter 3767 of the Ohio Revised Code has been unequivocally declared constitutional by this Court in Grove Press, Inc., v. Flask,

325 F. Supp, 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue, Ltd. v. Lawrence S. Huffman, Case No. C72-432.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Lawrence S. Huffman
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

Appendix P

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Affidavit of Fred Hawk	2-3
Time Motion Study of Films "Documentary of A Madam" and "Hedonist Hypnotist" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in support of motion to dismiss in *Parsac Ltd. v. Huffman et al.* C72-432	4-39

AFFIDAVIT

STATE OF OHIO
ALLEN COUNTY SS:

FRED HAWK, being first duly sworn, says that he is a deputy sheriff of Allen County, Ohio; that on January 10, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Documentary of a Madam" and "The Hedonist Hypnotist".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures, that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

1.	at photograph 103	fellatio
2.	at photograph 105	sexual intercourse
3.	at photographs 113-114	fellatio
4.	at photographs 116-135	sexual intercourse
5.	at photographs 147-154	fellatio
6.	at photographs 157-184	sexual intercourse, group sex, lesbianism

7.	at photographs 235-241	fellatio, group sex
8.	at photographs 250-282	fellatio
9.	at photographs 254-279	cunnilingus
10.	at photographs 280-289	cunnilingus
11.	at photographs 284-292	sexual intercourse
12.	at photographs 295-307	sexual intercourse
13.	at photographs 322-323	sexual intercourse
14.	at photographs 350-351	masochism
15.	at photographs 390-449	sadism
16.	at photographs 458-461	cunnilingus
17.	at photographs 465-472	sexual intercourse
18.	at photograph 475	cunnilingus
19	at photographs 476-489	sexual intercourse
20.	at photographs 502-602	lesbianism
21.	at photographs 530-551	cunnilingus
22.	at photographs 571-578	female masturbating another female with electric vibrator
23.	at photographs 585-597	female having "intercourse" with another female with dildo
24.	at photographs 827-844	sexual intercourse
25.	at photographs 859-933	lesbianism
26.	at photographs 905-912	cunnilingus
27.	at photographs 926-932	cunnilingus
28.	at photographs 955-976	female masturbation
29.	at photographs 1084-1095	sexual intercourse
30.	at photographs 1107-1139	lesbianism
31.	at photographs 1134	cunnilingus
32.	at photographs 1154-1202	group sex

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence this ___ day of February, 1973.

_____
Notary Public

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 1 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 2 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM" - Fellatio 103 - sexual intercourse 105 - fellatio 113, 114 - sexual intercourse 116 thru 135

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 3 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM" - Fellatio 147 thru 154 - sexual intercourse, group sex, lesbianism 157 thru 184

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 4 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM" - Fellatio, group sex 235 thru 241 - fellatio 250 thru 282 - cunnilingus, fellatio, sexual intercourse 250 thru 288

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 5 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM" - Sexual intercourse, cunnilingus 289 thru 323

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" · PART 6 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM"

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"DOCUMENTARY OF A MADAM" - Cunnilingus 458 thru 461 - sexual intercourse 465 thru 472 - cunnilingus 475 - sexual intercourse 476 thru 489 - lesbianism 502 thru 504

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"DOCUMENTARY OF A MADAM" - Lesbianism, cunnilingus 505 thru 551 - female masturbating another with electric vibrator 571 thru 576

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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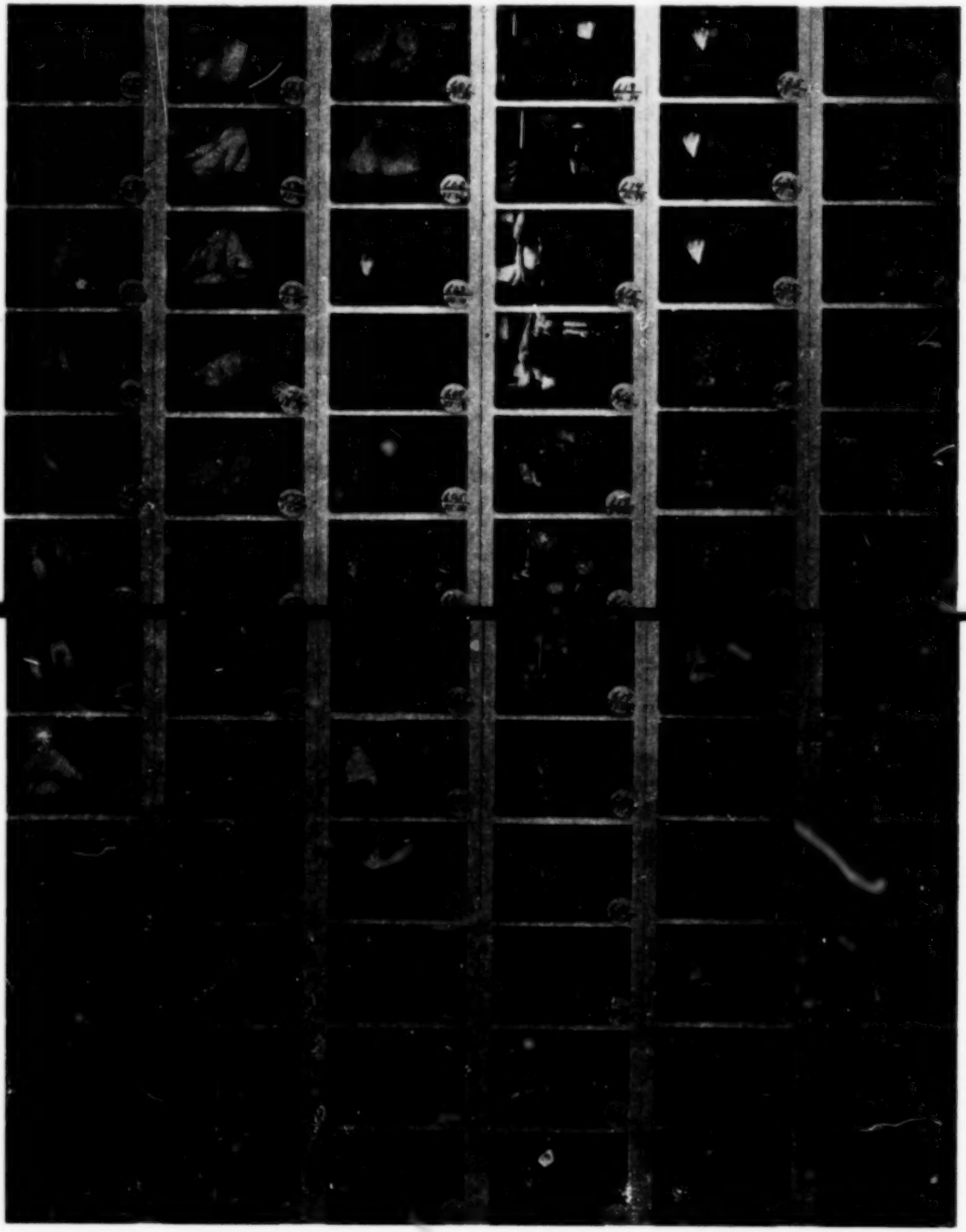

P-20

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"DOCUMENTARY OF A MADAM" - Females performing sexual intercourse by use of dildo 585 thru 597 - Previews 636 thru 648

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 10 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Previews 649 thru 700 title appears The Hedonist Hypnotist 701 thru 705

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 12 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 10, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

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"HEDONIST HYPNOTIST" - Sexual intercourse 827 thru 844 - lesbianism 859 thru 864

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 13 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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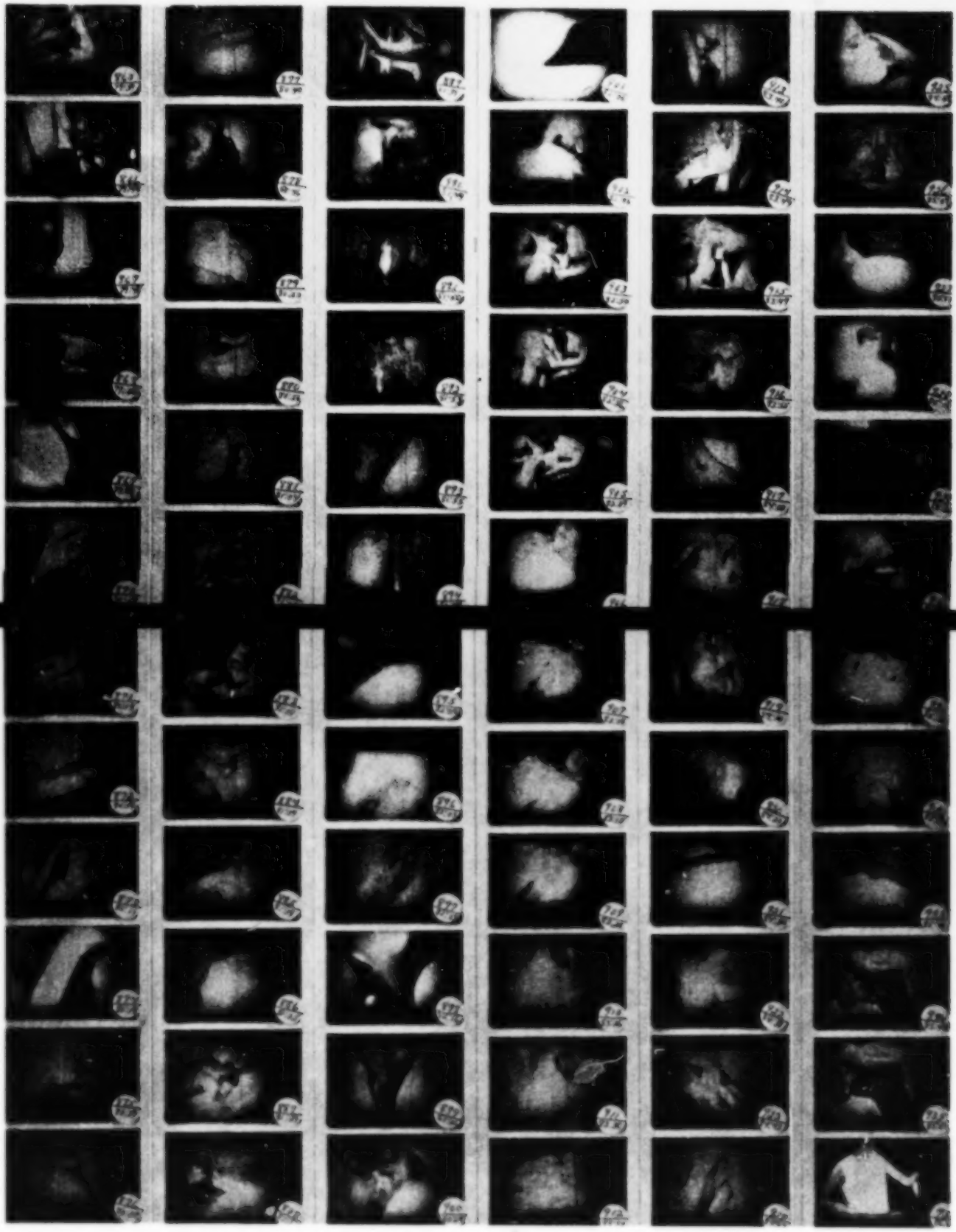

P-28

P-29

"HEDONIST HYPNOTIST" - Lesbianism, cunnilingus 865 thru 933

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Female masturbates 955 thru 976

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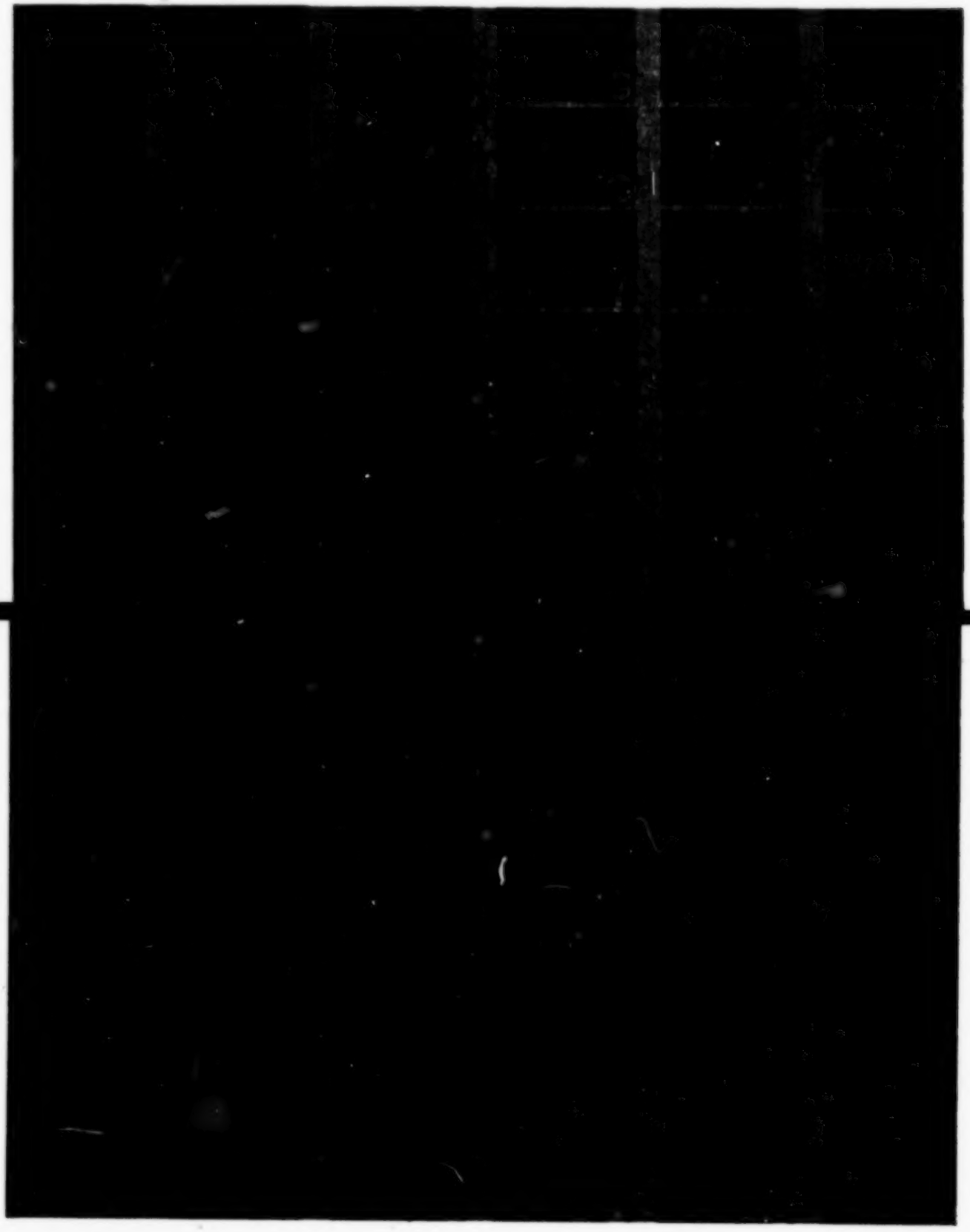

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"HEDONIST HYPNOTIST"

TIME-MOTION STUDY OF FILMS "DOCUMENTARY OF A MADAM" AND "HEDONIST HYPNOTIST" - PART 16 of 18 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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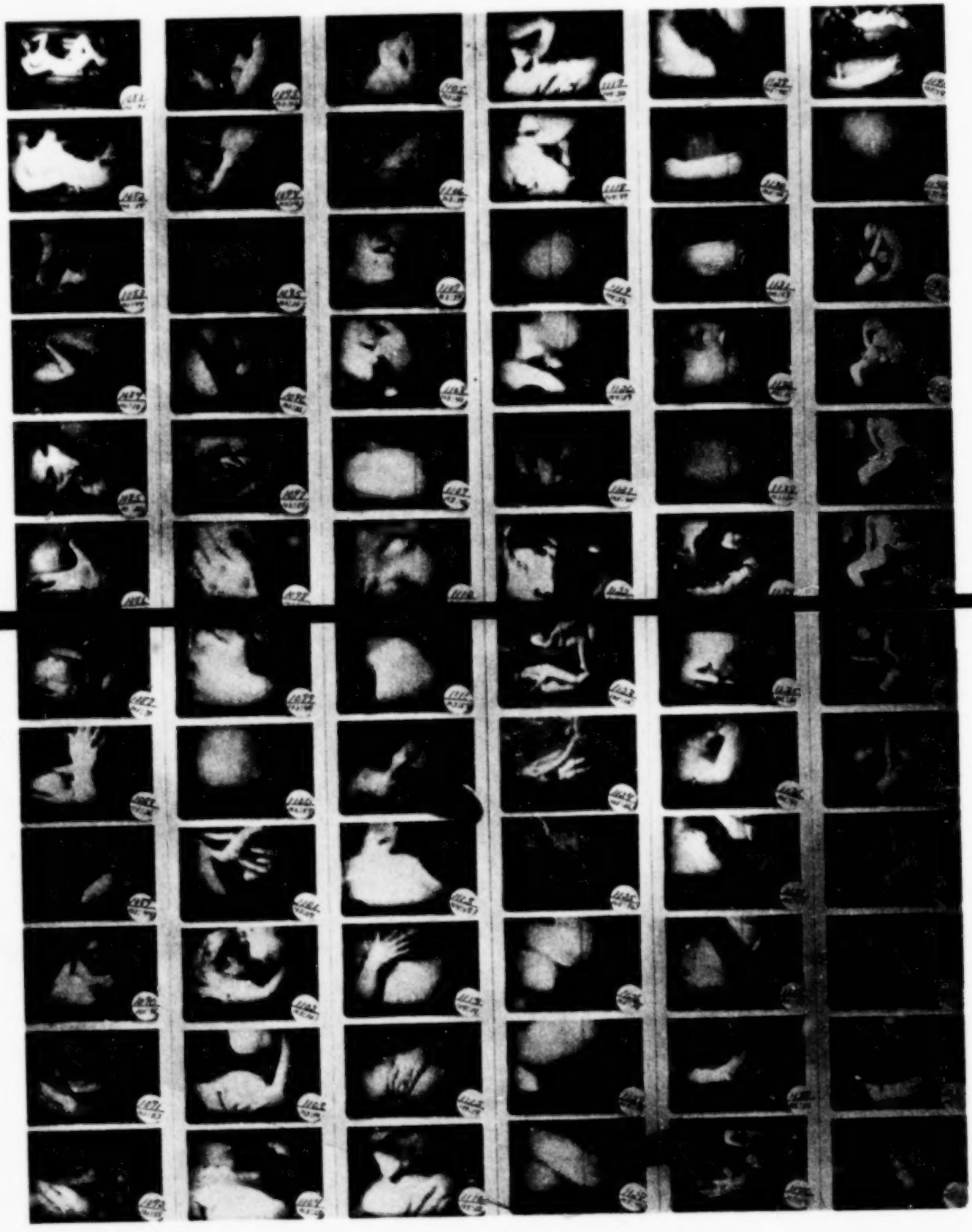

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"HEDONIST HYPNOTIST" - Sexual intercourse 1084 thru 1095 - lesbianism, cunnilingus 1107 thru 1139

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"HEDONIST HYPNOTIST" - Group sex 1154 thru 1202

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Deputy Sheriff Fred Hawk in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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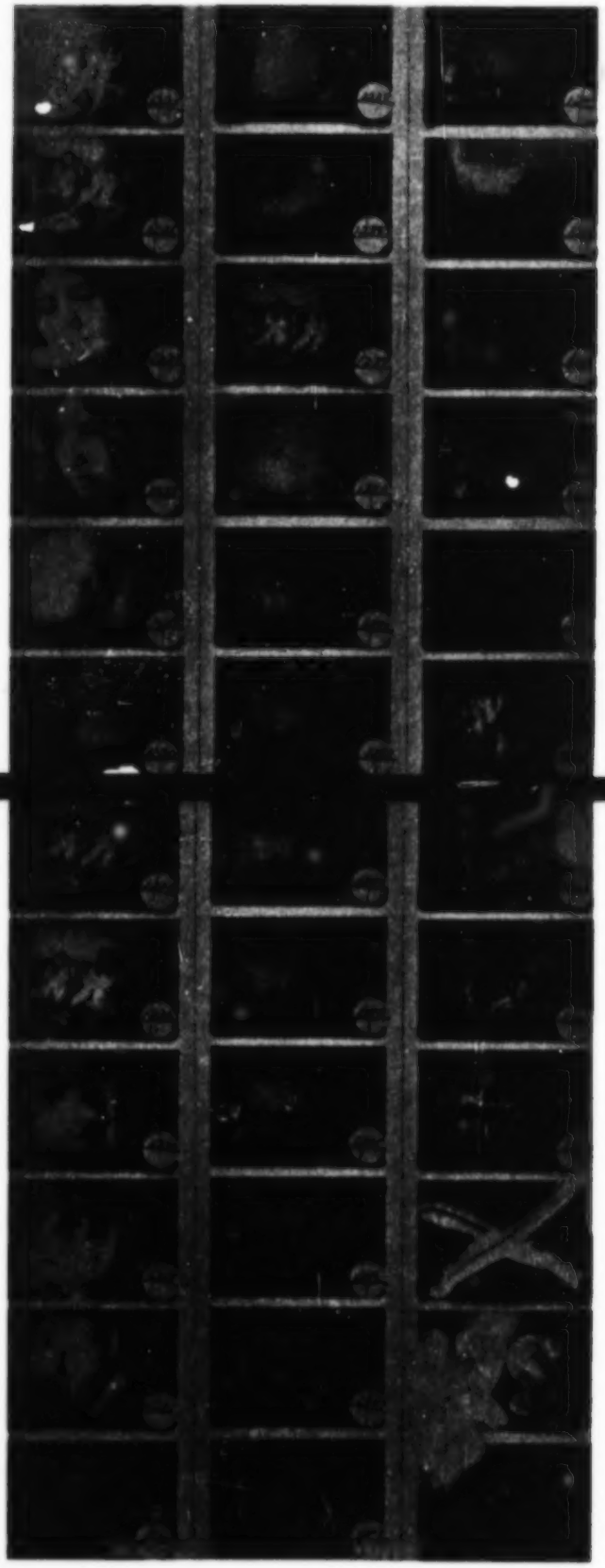

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"HEDONIST HYPNOTIST" · End 1240

Appendix Q

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Affidavit of Larry Winegardner.	2-3
Time Motion Study of Films "The Chateau" and "Dirt Bike Bangers" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Policeman Larry Winegardner in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432 . . .	4-41

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

LARRY WINEGARDNER, being first duly sworn, says that he is a policeman for the City of Lima, Ohio; that on January 23, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, #69 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "The Chateau" and "Dirt-Bike Bangers".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

1.	At photographs 317-337	fellatio
2.	at photographs 338-340	Sexual intercourse
3.	at photographs 345-348	sexual intercourse
4.	at photographs 354-377	anal sodomy
5.	at photographs 635-641	cunnilingus (female on female)
6.	at photographs 717-720	cunnilingus
7.	at photographs 722-723	sexual intercourse
8.	at photographs 733-734	sexual intercourse
9.	at photographs 741-746	sexual intercourse
10.	at photographs 758-765	fellatio

11.	at photographs 771-775	fellatio
12.	at photographs 777-781	fellatio
13.	at photographs 796-800	female masturbating herself
14.	at photographs 817-820	fellatio
15.	at photographs 902-910	sexual intercourse
16.	at photographs 946-975	lesbianism
17.	at photographs 953-972	cunnilingus (female on female)
18.	at photographs 1029-1047	sexual intercourse
19.	at photographs 1098-1104	sexual intercourse
20.	at photographs 1112-1115	sexual intercourse
21.	at photographs 1273-1284	sexual intercourse

Further affiant saith not.

Larry A Winegardner

Sworn to before me and subscribed in my presence, this 7TH day of February, 1973.

Notary Public

[illegible]

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 1 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"THE CHATEAU" · Previews 73-120, Feature The Chateau starts 124

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 3 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" . PART 4 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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Q-10

Q-11

"THE CHATEAU"

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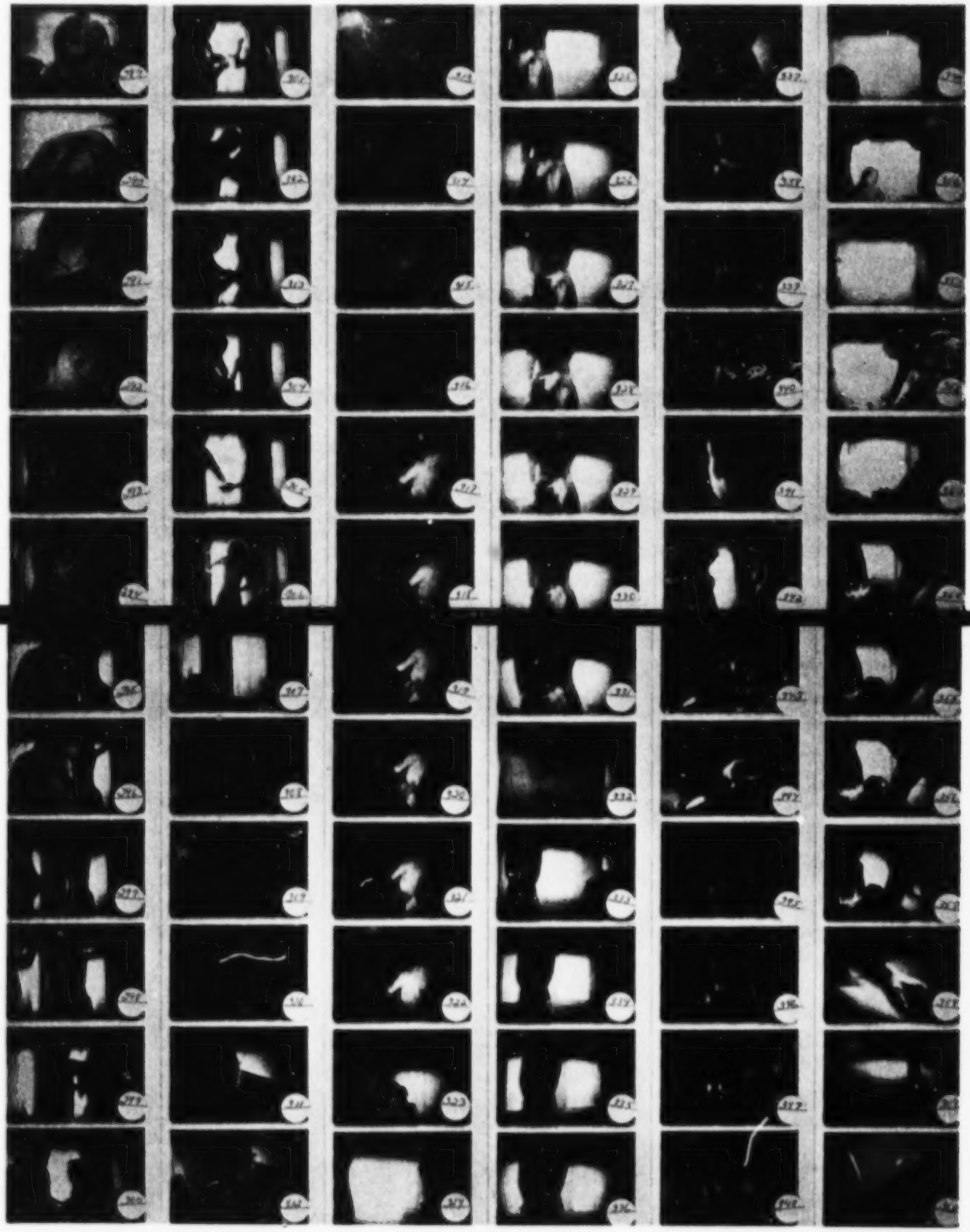

Q-12

Q-13

"THE CHATEAU" · Fellatio 317-337, sexual intercourse 338-340, 345-348, anal sodomy 354-360

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 6 of 19 PARTS

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Q-14

Q-15

"THE CHATEAU" - Anal sodomy 361-377

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 7 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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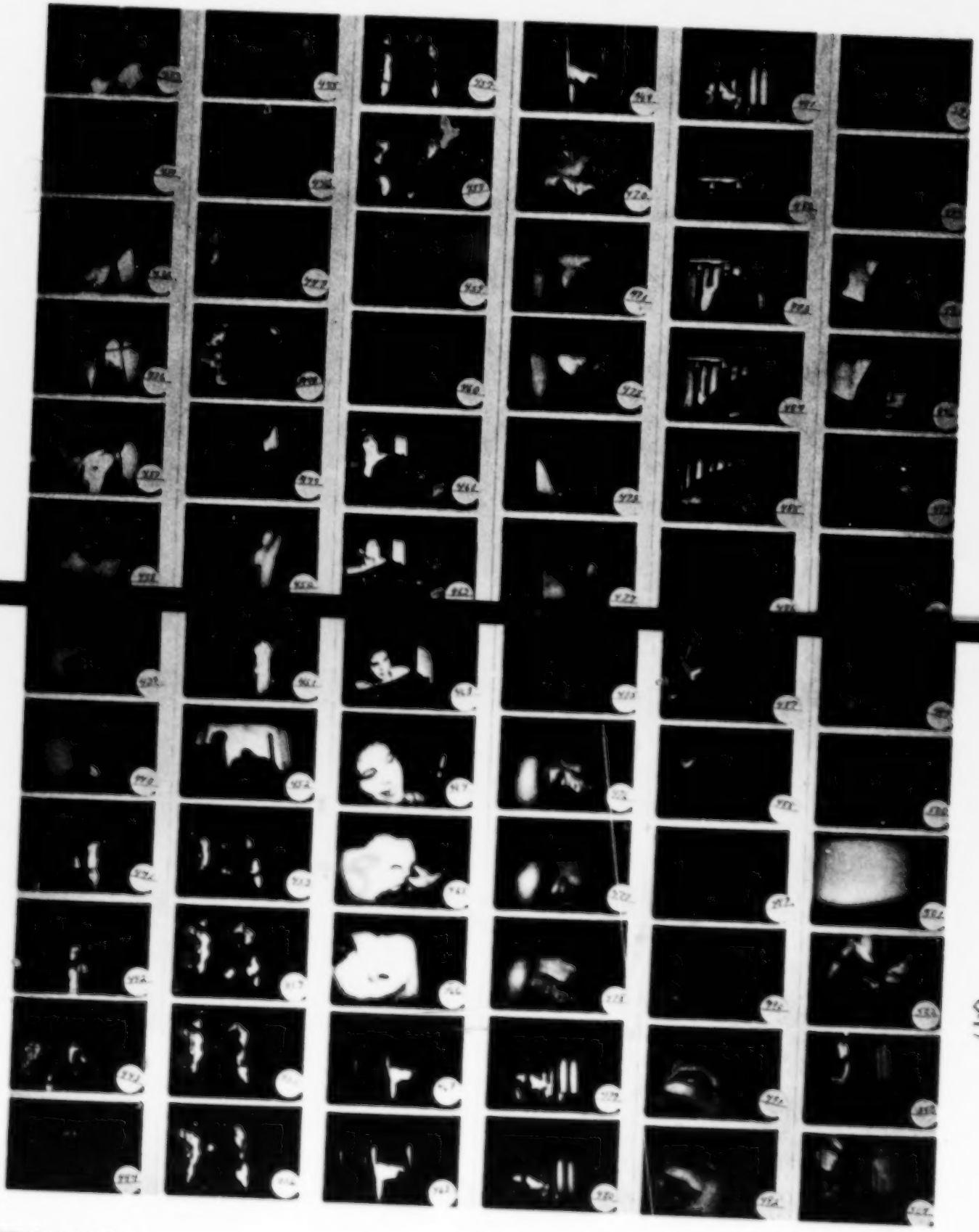

"THE CHATEAU"

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 8 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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O-18

O-19

"THE CHATEAU"

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Q-20

Q-21

"THE CHATEAU" - Cunnilingus (female on female) 635-641

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Q-22

Q-23

"THE CHATEAU" · Cunnilingus 717-720

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" · PART 11 of 19 PARTS

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"THE CHATEAU" · Sexual intercourse 722-728, 733-734, 741-746, fellatio 758-765, 771-775, 777-781

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 12 of 19 PARTS

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Q-26

Q-27

"THE CHATEAU" - Female masturbation 796-808, fellatio 817-820, End 844
"DIRT BIKE BANGERS" Title 845-846

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" · PART 13 of 19 PARTS

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O-28

O-29

"DIRT BIKE BANGERS" · Sexual intercourse 902-910

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Q-30

Q-31

"DIRT BIKE BANGERS" · Lesbianism 946-948, cunnilingus (female on female) 953-972

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 15 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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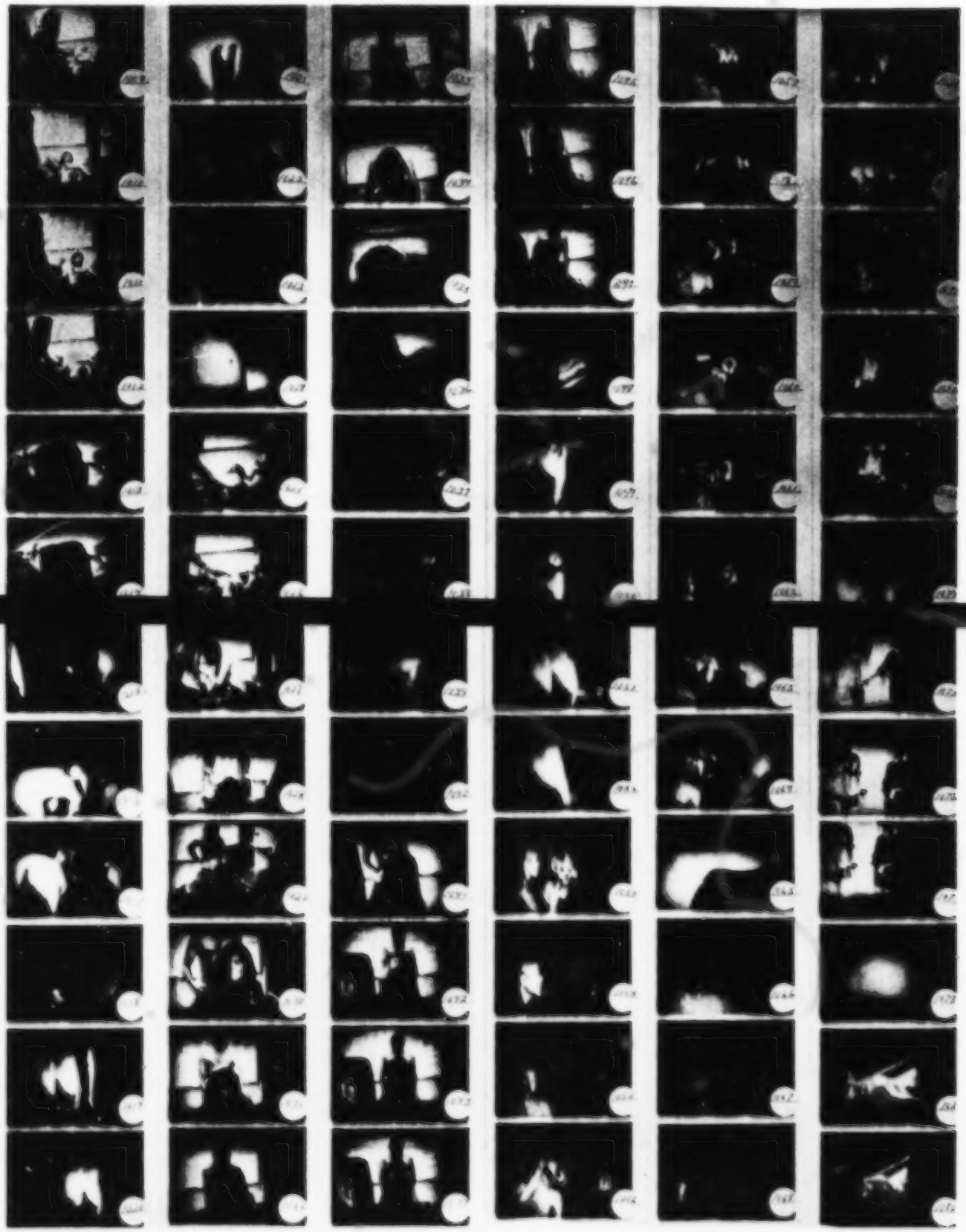

Q-32

Q-33

"DIRT BIKE BANGERS" - Sodomy 1029-1047

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 16 of 19 PARTS

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Q-34

Q-35

"DIRT BIKE BANGERS" - Sexual intercourse 1098-1104, 1112-1115

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 17 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

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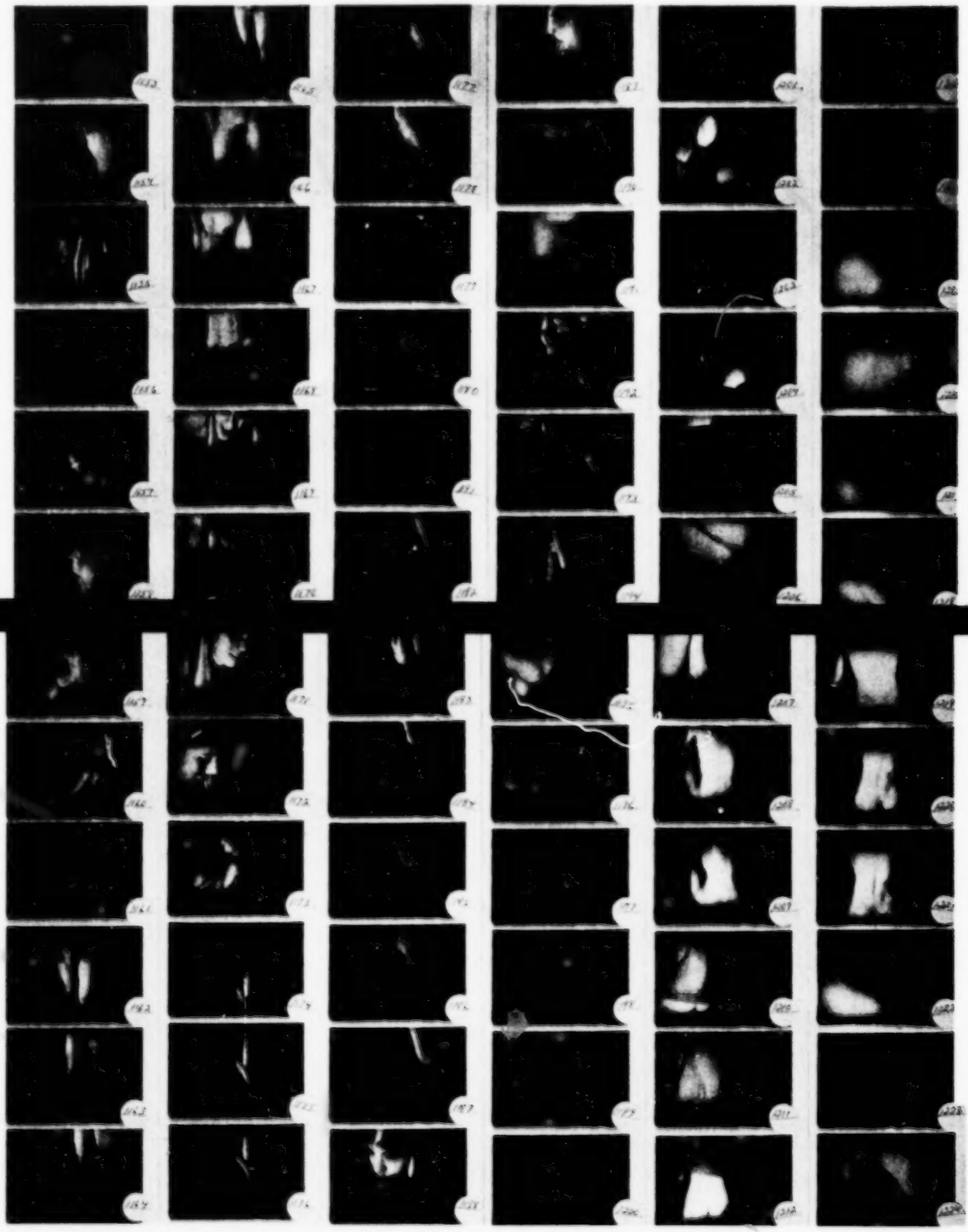


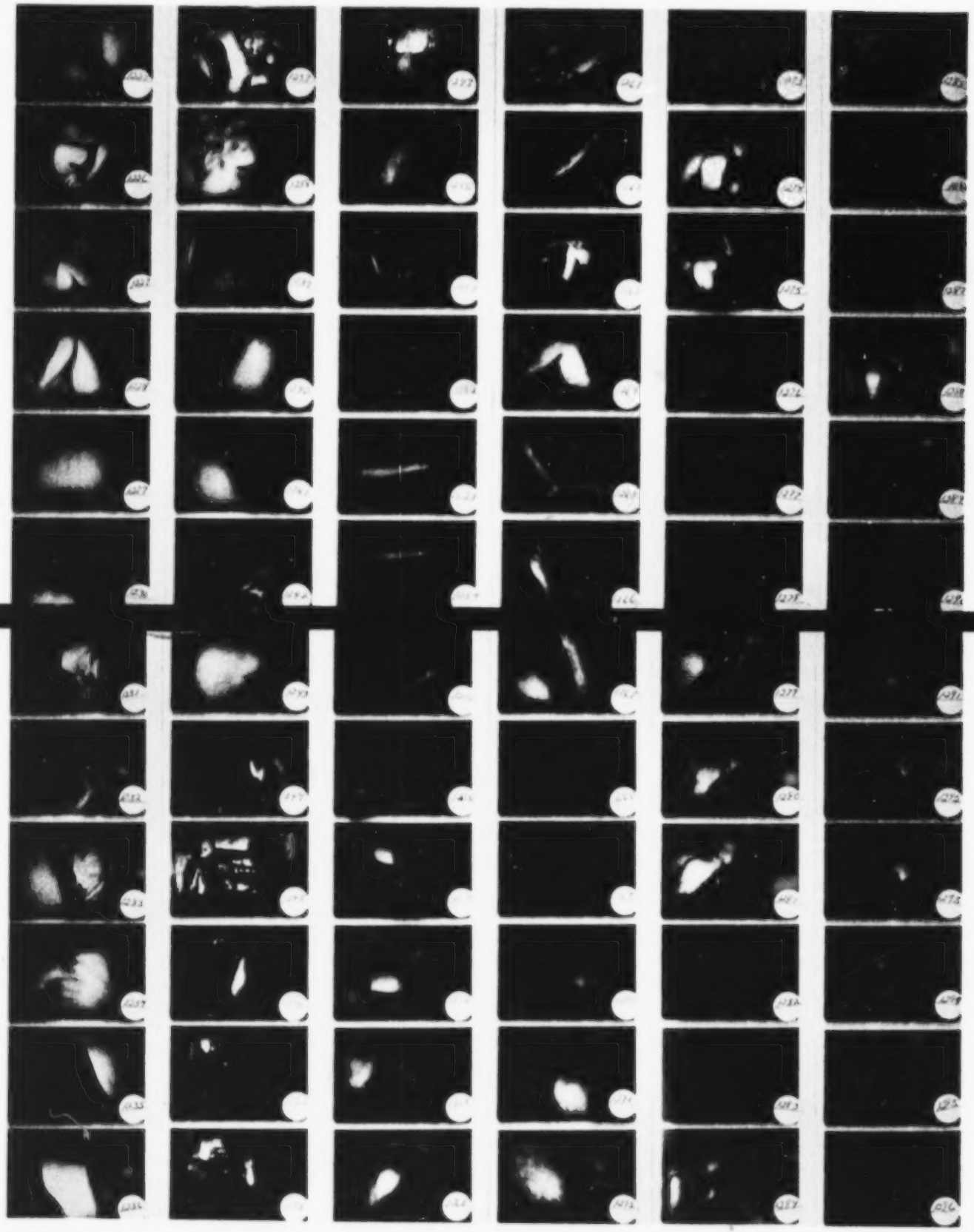
Q-36

Q-37

"DIRT BIKE BANGERS"

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



Q-38

Q-39

"DIRT BIKE BANGERS" - Sexual intercourse 1273-1284

TIME-MOTION STUDY OF FILMS "CHATEAU" AND "DIRT BIKE BANGERS" - PART 19 of 19 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 23, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

Q-40

Q-41

"DIRT BIKE BANGERS" - End 1338, Previews 1340-1359

Appendix R

	Page
Affidavit of Larry Winegardner.	3-5
Time Motion Study of Films "Hundred Dollar Wife" and "Massage Parlor" filed with Three Judge District Court on Feb. 12, 1973, with supporting affidavit of Policeman Larry Winegardner in support of motion to dismiss in *Pursue Ltd. v. Huffman et al.* C72-432.	6-51

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

LARRY WINEGARDNER, being first duly sworn, says that he is a policeman for the City of Lima, Ohio; that on January 24, 1973, he paid $3.00 and was admitted to the Cinema I Theatre, 169 Public Square, Lima, Ohio, and that he viewed two motion pictures entitled "Hundred Dollar Wife" and "Massage Parlor".

Affiant says that attached hereto and incorporated by reference is a time motion study of said motion pictures; that said photographs appear in the chronological order in which they were taken and as numbered; that said photographs reflect that which was depicted on the screen at the time in the program as depicted on said photographs; and that said photographs are true and accurate representations of that which affiant saw projected on the motion picture screen at said location on said date.

Affiant says that he viewed a multitude of various sexual acts performed in said motion pictures and depicted upon said motion picture screen at said location on said date; and that the attached photographs depict accurately the said sexual acts viewed by affiant as follows:

1. at photographs 100-111 fellatio
2. at photographs 120-122 Sexual intercourse
3. at photographs 124-128 cunnilingus
4. at photographs 145-152 cunnilingus
5. at photographs 182-186 fellatio
6. at photographs 196-208 cunnilingus
7. at photographs 215-217 cunnilingus
8. at photographs 222-224 fellatio

9.	at photographs 223-239	male performing cunnilingus on female; female performing fellatio on male
10.	at photographs 240-252	cunnilingus
11.	at photographs 270-285	sexual intercourse
12.	at photographs 286-288	male performing cunnilingus on female; female performing fellatio on male
13.	at photographs 291-344	sexual intercourse
14.	at photographs 401-459	lesbianism
15.	at photographs 429-458	cunnilingus (female on female)
16.	at photographs 540-541	sexual intercourse
17.	at photographs 566-568	cunnilingus
18.	at photographs 572-577	fellatio
19.	at photographs 579-594	sexual intercourse
20.	at photographs 611-632	sexual intercourse
21.	at photographs 611-615	close-up of penetration
22.	at photographs 745	sexual intercourse
23.	at photographs 790-791	cunnilingus
24.	at photographs 956-990	fellatio
25.	at photographs 1059-1100	female puts male penis in hot dog bun and performs fellatio
26.	at photographs 1109-1146	cunnilingus
27.	at photographs 1157-1169	sexual intercourse
28.	at photographs 1170-1192	male performing cunnilingus on female; female performing fellatio on male
29.	at photographs 1193-1208	sexual intercourse
30.	at photographs 1219-1247	sexual intercourse
31.	at photographs 1248-1282	sexual intercourse
32.	at photographs 1287-1307	sexual intercourse

33.	at photographs 1308-1340	sexual intercourse
34.	at photographs 1341-1367	sexual intercourse
35.	at photographs 1371-1375	cunnilingus
36.	at photographs 1417-1441	group sex (cunnilingus, anal sodomy, etc)
37.	at photographs 1494-1505	fellatio
38.	at photographs 1531-1537	sexual intercourse
39.	at photographs 1538-1540	fellatio
40.	at photographs 1541-1543	sexual intercourse
41.	at photographs 1555-1561	sexual intercourse
42.	at photographs 1562-1566	cunnilingus
43.	at photographs 1567-1569	sexual intercourse
44.	at photographs 1570-1574	cunnilingus performed on female by male; fellatio performed on male by female
45.	at photographs 1575-1576	sexual intercourse
46.	at photographs 1577-1578	cunnilingus
47.	at photographs 1579-1584	fellatio

Further affiant saith not.

[illegible]

Sworn to before me and subscribed in my presence, this 6TH day of February, 1973.

[illegible]
Notary Public

[illegible]

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 1 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-6

R-7

"100 DOLLAR WIFE"

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 2 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-8

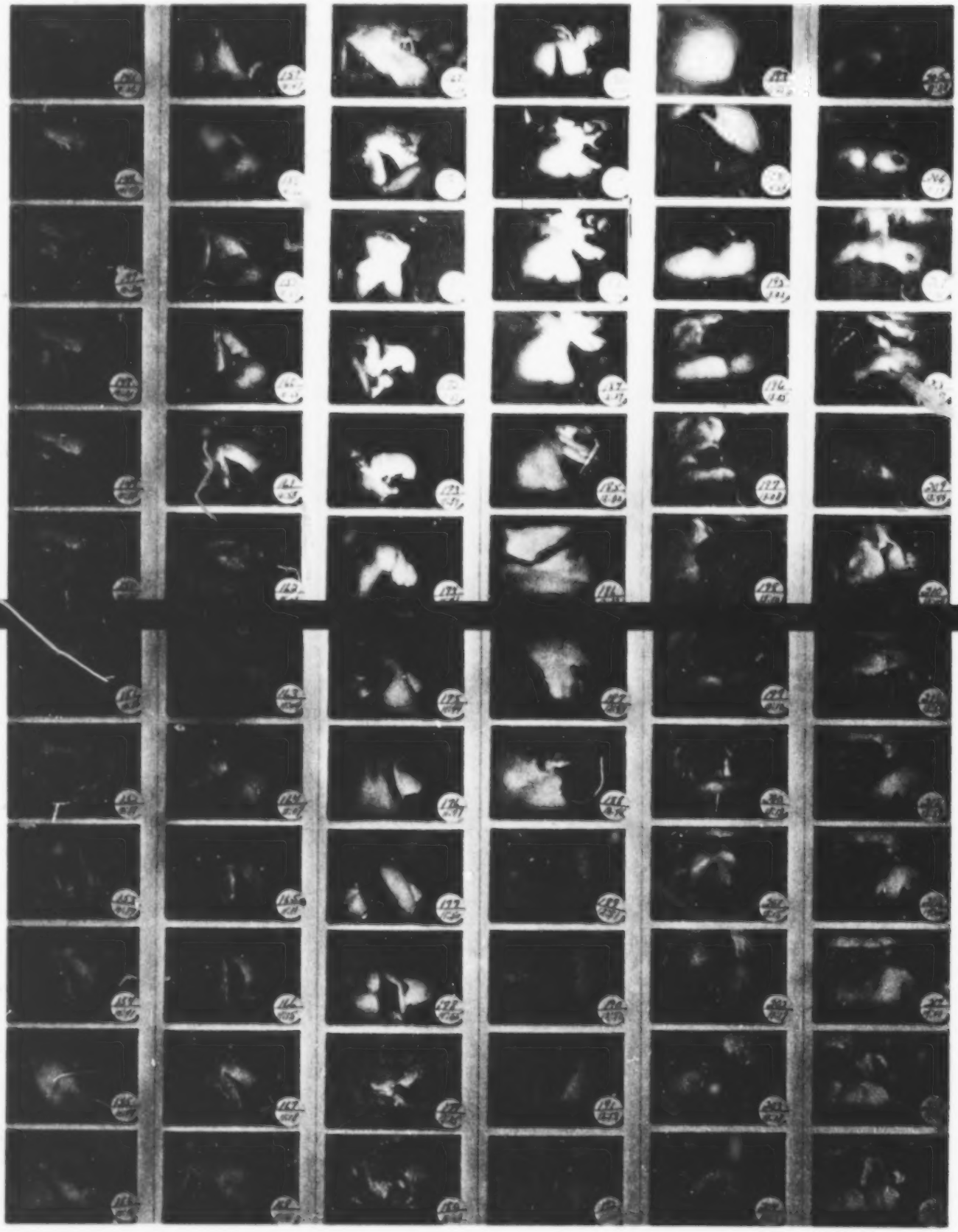
R-9

"100 DOLLAR WIFE" - Fellatio 100-111, sexual intercourse 120-122, cunnilingus 124-128

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 3 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



R-10

R-11

"100 DOLLAR WIFE" - Cunnilingus 145-152, fellatio 182-186, cunnilingus 196-208, 215-216

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 4 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-12

R-13

"100 DOLLAR WIFE" - Cunnilingus 217, fellatio 222-224, male & female performing simultaneous fellatio & cunnilingus 228-239, cunnilingus 240-252, sexual intercourse 270-285, male & female performing fellatio & cunnilingus on each other 286-288

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 5 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

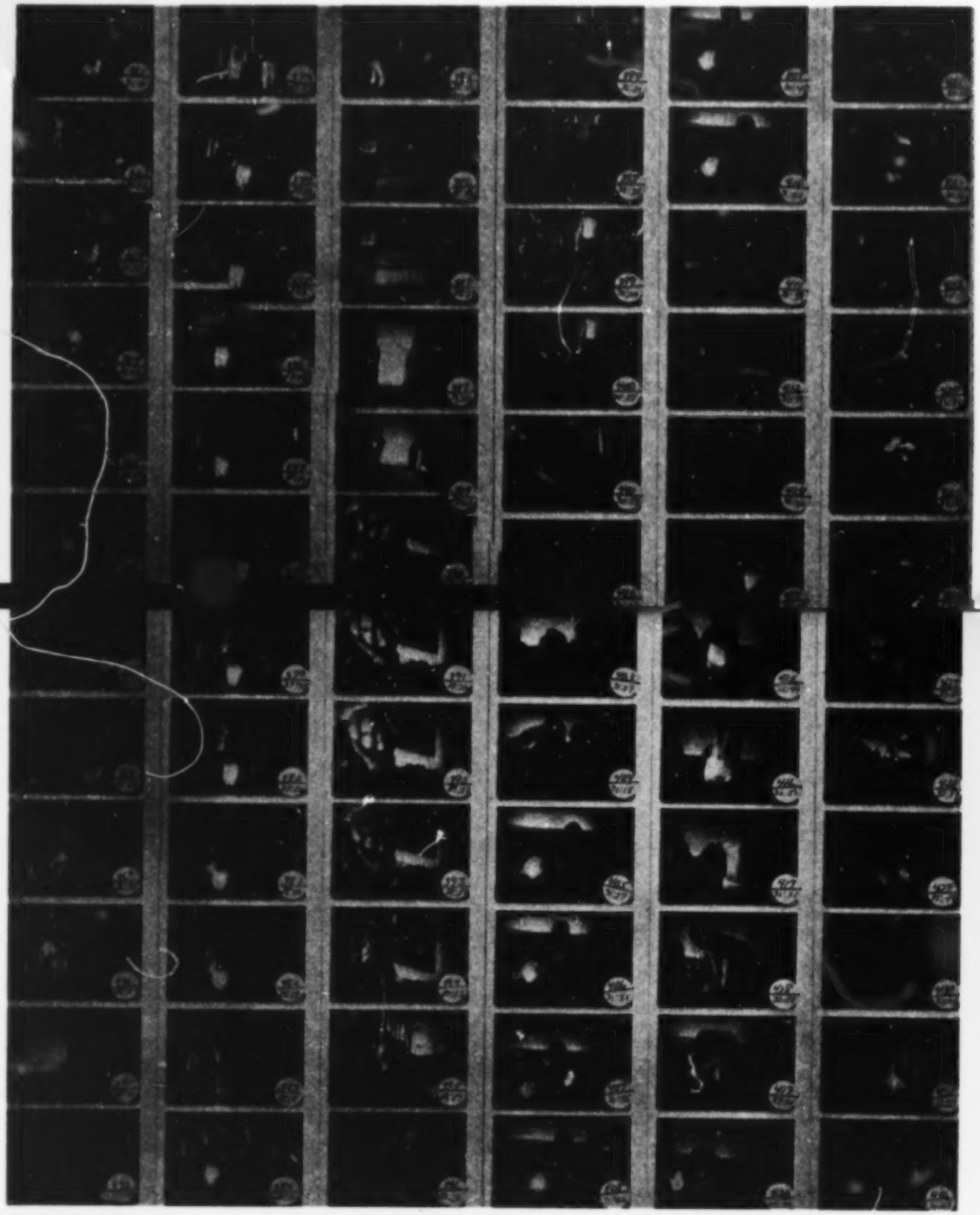
R-14

R-15

"100 DOLLAR WIFE" - Sexual intercourse 291-344

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



R-16

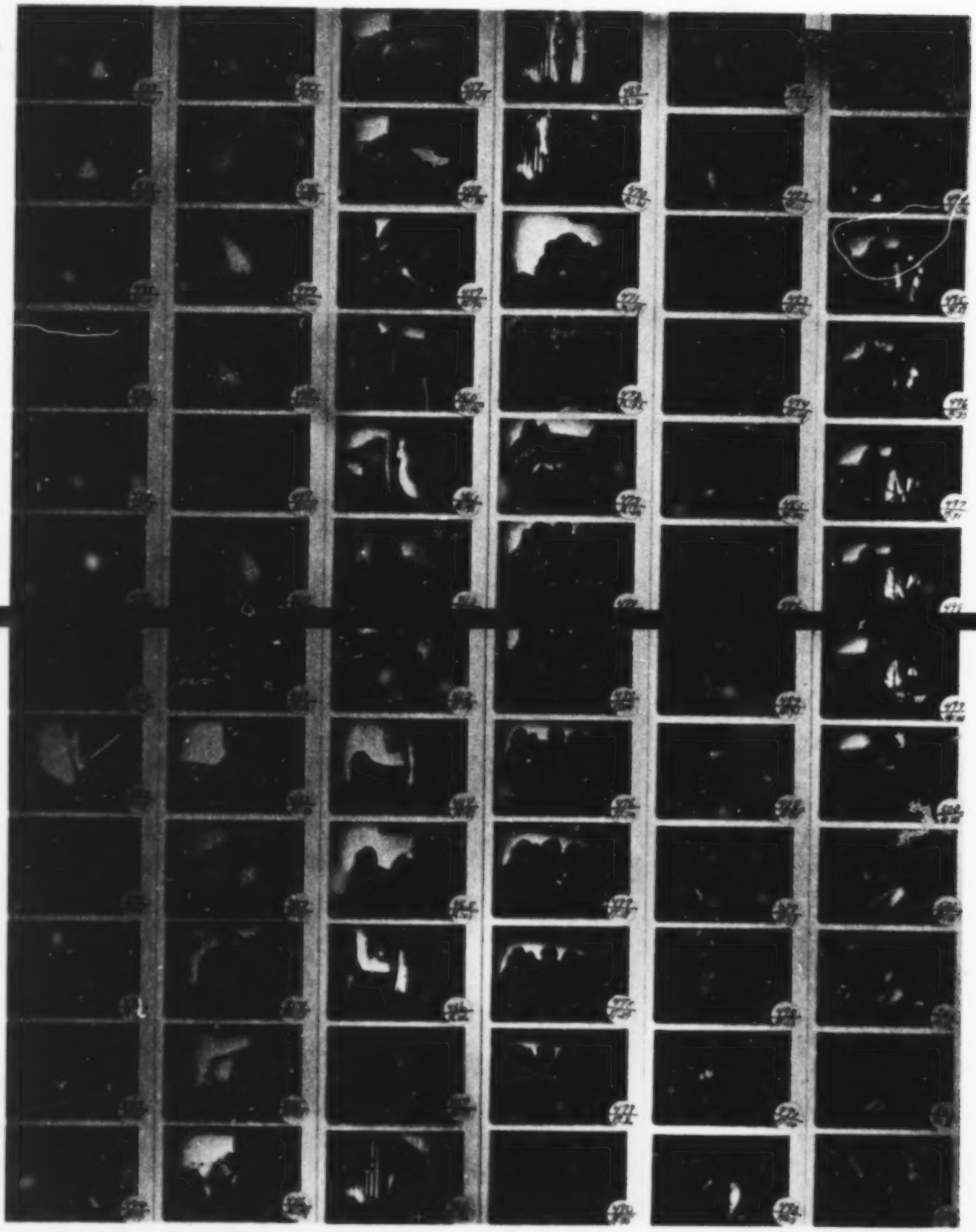
R-17

"100 DOLLAR WIFE" - Lesbianism, cunnilingus (female on female) 401-432

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 7 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.



R-18

R-19

"100 DOLLAR WIFE" - Lesbianism, cunnilingus 433-458

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" · PART 8 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-20

R-21

"100 DOLLAR WIFE" · Sexual intercourse 540-541, cunnilingus 566-568, fellatio 572-576

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384

R-22

R-23

"100 DOLLAR WIFE" · Fellatio 577, sexual intercourse 579-594, 611-630 (penetration closeup)

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 10 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-24

R-25

"100 DOLLAR WIFE" - End 678 - Previews 679-720

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 11 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 59 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-26

R-27

"100 DOLLAR WIFE" - Previews 721-792 (cunnilingus 790-791)

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 12 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-28

R-29

"MASSAGE PARLOR" - Previews 793-797, "Massage Parlor" title 798-799

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 13 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-30

R-31

"MASSAGE PARLOR"

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 14 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-32

R-33

"MASSAGE PARLOR" - Fellatio 956-990

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 15 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-34

R-35

"MASSAGE PARLOR" - Female inserts male penis in hot dog bun & performs fellatio 1059-1080

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 16 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-36

R-37

"MASSAGE PARLOR" - Fellatio 1081-1100, cunnilingus 1109-1146

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384

"MASSAGE PARLOR" - Sexual intercourse 1157-1169, male and female perform cunnilingus and fellatio on each other 1170-1192, sexual intercourse 1193-1208, 1219-1224

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 18 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-40

R-41

"MASSAGE PARLOR" - Sexual intercourse 1225-1247, 1248-1282, 1287-1296

TIME MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 19 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-42

R-43

"MASSAGE PARLOR" - Sexual intercourse 1297-1367

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 20 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-44

R-45

"MASSAGE PARLOR" - Cunnilingus 1371-1375, group sex (cunnilingus, anal sodomy, etc.) 1417-1440

TIME-MOTION STUDY OF FILMS "100 DOLLAR WIFE" AND "MASSAGE PARLOR" - PART 21 of 23 PARTS

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

R-46

R-47

"MASSAGE PARLOR" - Fellatio 1494-1506

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384

R-48

R-49

"MASSAGE PARLOR" - Sexual intercourse 1531-1537, fellatio 1538-1540, sexual intercourse 1541-1543, 1555-1561, cunnilingus 1562-1566, sexual intercourse 1567-1569, cunnilingus, fellatio by male & female 1570-1574, cunnilingus 1577-1578, fellatio 1579-1584

*Filed with three Judge Federal District Court on February 12, 1973, with supporting affidavit of Policeman Larry Winegardner in motion to dismiss Pursue Ltd. v. Huffman et al C72-432. (See page 21)

**Exhibited at Cinema I Theatre, 69 Public Square, Lima, Ohio on January 24, 1973, in violation of Allen County Common Pleas Court final judgment of November 24, 1972, in State of Ohio ex rel Huffman v. William H. Dakota et al 72 CIV 0326, closing the theatre after trial under O.R.C. Sect. 3767.06 as a public nuisance, as stayed by Federal District Judge Walinski's temporary restraining order, dated November 2, 1972 in William Dakota v. Sheriff Fair et al C72-384.

"MASSAGE PARLOR" - End 1612-1613

R-50

R-51

Appendix S

William H. Dakota v. State of Ohio ex rel Lawrence S. Huffman, C72-445, (being a Removal Action in the United States District Court for the Northern District of Ohio, Western Division)

Papers Included in Appendix: Page

Order of Judge Walinski on motion to dismiss, sua sponte, as moot. 3

In conformity with Rule 77 (d) F.R.C.P.
Please take notice that the following order or judgment was entered in this cause:

APR 27 1973

Dominic J. Chiulino, Clerk

FILED

1973 APR 26 4 00 PM

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel. LAWRENCE S. HUFFMAN,	)	
Respondent,	)	No. C 72-445
-vs-	)	
WILLIAM H. DAKOTA, et al.,	)	OPINION and ORDER
Petitioner.	)	

* * *

WALINSKI, J:

This cause came to be heard on a motion to dismiss sua sponte as moot.

It appearing to the Court that this Court's opinion in Pursue Ltd. v. Hoffman (C 72-432) (N.D. Ohio, April 20, 1973) has mooted the instant action, it is

ORDERED that this case should be and hereby is dismissed.

Richard J. Walinski
UNITED STATES DISTRICT JUDGE

Toledo, Ohio.

April 26, 1973.

Appendix T

State of Ohio, ex rel Lawrence S. Huffman v. William H. Dakota et al., 72 CIV 0326 (being a Civil Action in the Court of Common Pleas of Allen County Ohio, to abate the Cinema I Theater as a public nuisance)

Papers Included in Appendix: Page

Motion of Plaintiff State of Ohio ex rel Huffman, filed May 1, 1973 3-4

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FILED
[illegible]
ROBERT J. [illegible]
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN	:	
Plaintiff	:	CASE NO. 72 CIV 0326
-vs-	:	
WILLIAM H. DAKOTA, et al	:	MOTION
Defendant	:	
	:	

.. ..

Plaintiff says that on October 24, 1972, the Court Ordered the Cinema I Theater, #69 Public Square, Lima, Ohio, closed for the purpose of the projection or screening of lewd, lascivious, indecent, or obscene films and that the defendant Robert Smith was personally served a copy of said Order.

Plaintiff says that on November 30, 1972, the Court extended its Order of October 24, 1972, and further permanently enjoined and restrained Robert Smith from conducting said nuisance and said Robert Smith received notice of said Order.

Plaintiff says that Robert Smith has violated the terms of said Orders by exhibiting in said theater on May 1, 1973, obscene motion picture films allegedly entitled "Just Married", "Back Door" and "Bob Dick" which depict numerous scenes of sexual intercourse, cunnilingus, and fellatio.

Wherefore, plaintiff requests that the Court direct Robert Smith to appear before the Court with said motion picture films forthwith so that the Court might determine whether said films are obscene and upon such determination to

require said Robert Smith to account for the box office receipts derived from the exhibition of such films, and forfeit the same.

Lawrence S. Huffman

Lawrence S. Huffman

STATE OF OHIO
ALLEN COUNTY SS:

LAWRENCE S. HUFFMAN, being first duly sworn, deposes and says that he has read the foregoing Motion and that the facts and allegations contained therein are true as he verily believes.

Sworn to before me and subscribed in my presence, this 1ST day of May, 1973.

Notary Public

GARY R. HYMAN
Notary Public, State of Ohio
My Commission has no Expiration Date

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN Plaintiff	:	CASE NO. 72 CIV 0326
-vs-	:	JOURNAL ENTRY
WILLIAM H. DAKOTA et al Defendant	:	

Upon sworn charges filed with the Clerk of Courts against Robert Smith alleging disobedience of the said Robert Smith to the former Order of this Court directing the non-exhibition of obscene motion picture films at the Cinema I Theater, 969 Public Square, Lima, Ohio, on motion of the plaintiff, a rule is allowed herein against the said Robert Smith directing him to appear before this Court on May 3, 1973, at 2:00 o'clock P.M., and to bring with him at such time the motion picture films "Just Married" "Back Door", and "Bob Dick" so that a determination might be made as to whether said films are obscene and upon such determination to require said Robert Smith to account for the box office receipts derived from the exhibition of said films and forfeit the same.

JUDGE

960131

THIS REPRODUCTION FAITHFULLY PROJECTS ORIGINAL COPY WHICH WAS ITSELF UNREADABLE.

Subpena Duces Tecum

CIVIL CASE

The State of Ohio, Allen County, Common Pleas Court

To [illegible], c/o Cinema I, Lima, Ohio

Projectionist John [illegible], c/o Cinema I, Lima, Ohio

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the 3 day of May A. D. 19 73 at 2:00 o'clock P M., to testify as a witness in a certain case pending in said Court, wherein State of Ohio, ex rel Lawrence S. Huffman Plaintiff and William H. Dakota, et al Defendant

and also that you bring with you and produce at the time and place aforesaid

the three motion picture films exhibited at the Cinema I Theater, 420 Public Square, Lima, Ohio, On May 1, 1973, and purportedly entitled "Just Married", "Back Door" and "Bob Dick"

and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the

WITNESS my hand and the seal of said Court this day of 19 73

Clerk

By Deputy

Appendix U

William H. Dakota et al v. State of Ohio, ex rel Lawrence S. Huffman, C73-176, (being a Removal Action in The United States District Court for the Northern District of Ohio, Western Division)

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Petition for Removal, filed May 3, 1973.	3-8
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Memorandum of Law on Effect of Removal of State Court Action, filed in Allen County Court on May 3, 1973.	10-11
Motion to Remand, filed May 14, 1973.	12-13
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Motion for Immediate Hearing and Memorandum in Support Thereof (less App. Exhibits A-F).	23-26
Affidavit of Deputy Sheriff Fred Hawk re films "Back Door", "Just Married" and "Bob Dick" viewed on May 1, 1973 at Cinema I Theatre.	27-28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN,

Respondent,

-versus-

WILLIAM H. DAKOTA, et al

Petitioners.

C 73-176

CIVIL ACTION

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Petition of WILLIAM H. DAKOTA, et al, including ROBERT SMITH and OTIS HATFIELD shows:

1.

An action was commenced against Petitioners in the Court of Common Pleas, Allen County, Ohio, entitled STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN, Plaintiff, against WILLIAM H. DAKOTA, and FLORA MAY COLLINS MOOR, and LELAND SAMUEL COLLINS, SARA LEE COLLINS, and PUSSY CAT CORPORATION, and CINEMA I THEATRE and John DOES and Jane DOES, Defendants, by the service upon them of a Summons and Complaint and Amended Complaint. Further proceedings have been had therein, to wit: two evidentiary hearings which resulted in temporary and permanent injunctions closing Cinema I Theatre.

2.

The above-described action is a civil action which may be removed to this Court by the Petitioners, pursuant to

the provisions of 28 U.S.C. §1443, in that Petitioners cannot enforce, in the Courts of the State of Ohio, a right under the Free Speech and Press Provisions of the Constitution of the State of Ohio, in that

(a) Respondent, Plaintiff in the said State Court action, has brought a Petition to close said business, which is the dissemination of sexually explicit materials, which are presumptively protected under the First Amendment to the Constitution of the United States and the Free Speech and Press Provisions of the Constitution of the State of Ohio, to willing adults only, under controlled circumstances under which the materials are not thrust upon the sensibilities of persons unwilling to view them and without "pandering" in the Ginsburg sense;

(b) Said Complaint of Respondent was based on the allegation in the Respondent's Complaint that the CINEMA I THEATRE, at premises located at 69 Public Square, Lima, Ohio, was a "nuisance;"

(c) On April 20, 1972, this Honorable Court declared Ohio Revised Statutes §3767.06 unconstitutional and enjoined enforcement of same to close CINEMA I THEATRE;

(d) On or about May 1, 1973, Petitioner ROBERT SMITH was served with process directing him to appear in the Court of Common Pleas of Allen County, Ohio, and "bring with him at such time" three motion picture films "so that a determination might be made as to whether said films are obscene;"

(e) On or about May 1, 1973, Petitioner ROBERT SMITH was served with "JOHN DOE" process to appear in the Court of Common Pleas of Allen County, Ohio, the process being similar to that abovementioned.

3.

Said action is also removable pursuant to the provisions of 28 U.S.C. §1443, in that

(a) Petitioners cannot enforce, in the Courts of the State of Ohio, rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) The Court of Common Pleas of Allen County has, in the recent past, and is still being utilized by the State of Ohio to curtail the exercise of First Amendment freedom as well as the right against self-incrimination guaranteed by the Fifth Amendment. The procedures employed by Respondent herein, acting by and through Prosecutor Lawrence S. Huffman of Allen County, will be upheld by the Supreme Court of Ohio, as decided within the past few days. (Exhibit "A")

4.

Petitioners show that they are alleged to have disseminated obscene materials, but Petitioners show further that there has been no final adjudication of a violation of the Ohio obscenity laws involving Petitioners.

5.

Petitioners show that local prejudices have been so inflamed by the Court's actions and actions and statements of the Prosecutor of Allen County, that it will be impossible for them to protect their First and Fifth Amendment rights in the Court of Common Pleas of Allen County.

6.

Said action is also removable pursuant to 28 U.S.C. §1441 (b) in that it is an action of which the District Courts

have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C. §1343, to redress deprivation of the civil rights of Petitioners, to-wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioners re-allege their allegations in Paragraph 3(a) and 3(b) and Paragraphs 4 and 5, and incorporate them as Paragraph 6(b) hereof.

7.

Petitioners file herewith a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446 (d), that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioners pray that the action now pending against them in the Court of Common Pleas of Allen County, Docket Number 72 CIV-0326 be removed therefrom to this Court for the reasons set out hereinbefore.

Respectfully submitted,

TED IORIO, Esquire
435 South Hawley Street
Toledo, Ohio 43609
(419) 248-5351

GILBERT H. DEITCH, Esquire
Suite 2005, 100 Colony Square
1175 Peachtree Street, N. E.
Atlanta, Georgia 30361
(404) 892-8890

BY:

ATTORNEYS FOR PETITIONERS

STATE OF OHIO

COUNTY OF LUCAS

V E R I F I C A T I O N

Personally appeared before me, the undersigned, TED IORIO, Attorney for Petitioners herein, and after first being duly sworn, deposes and says that the facts alleged in the above and foregoing Petition for Removal are true and correct, to the best of his current knowledge, information, and belief.

TED IORIO

SOWRN TO AND SUBSCRIBED before me, this 1st day of May, 1972.

NOTARY PUBLIC

JACQUELINE A. WIATRS

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 11 day of May, 1973, a true and exact copy of the foregoing was served upon Lawrence S. Huffman, Allen County Courthouse, Lima, Ohio.

Ted Iorio

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio, ex rel Lawrence S. Huffman,

Respondent,

-vs-

William H. Dakota, et al.,

Petitioners.

Civil Action No.

NOTICE OF REMOVAL

C 73-178

To: Robert P. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To: Lawrence S. Huffman
Prosecuting Attorney
127 N. Prospect Street
Lima, Ohio, 45802

You, and each of you, are hereby notified that on the 3rd day of May, 1973, William H. Dakota, et al., filed in the District Court for the Northern District of Ohio, Western Division, a Petition for Removal of Cause No. 72-Civ-0326, in the Court of Common Pleas of Allen County and entitled State of Ohio, ex rel Lawrence S. Huffman, Plaintiff, vs. William H. Dakota, et al., Defendants.

Ted Iorio

Dated this 3rd day of May, 1973.

STATE OF OHIO)
: ss.
LUCAS COUNTY)

I, Ted Iorio, being first duly sworn, say that the foregoing notice and copy of petition for removal have been hand delivered to Robert P. Dunlap, Clerk of Courts, Allen County Court House, Lima, Ohio, and Lawrence S. Huffman, Prosecuting Attorney, 127 N. Prospect Street, Lima, Ohio, this 3rd day of May, 1973.

Ted Iorio

Sworn to before me and subscribed in my presence this 3rd day of May, 1973.

Notary Public

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel :
LAWRENCE S. HUFFMAN, :

Plaintiff, :

v. :

WILLIAM H. DAKOTA, et al :

Defendant. :

C 73-176

CASE NO. 72 CIV-0326

MEMORANDUM OF LAW ON EFFECT
OF REMOVAL ON STATE COURT ACTION

It is brought to the Court's attention that the above styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division. This memorandum is intended to show the effect of said removal upon the above styled action.

The filing of a petition for removal under the statutes governing the procedures for removal effects an automatic removal from State Court to Federal District Court, and such removal stops any further proceeding in State Court pending the District Court's action. 28 U.S.C. §1446(e).

Compliance with the form and procedure of removal under 28 U.S.C. §144 is all that is necessary to effect automatic removal from the State Court to the District Court. Baltimore & Ohio Railroad Company v. Koontz, 104 U.S. 5, 14, 26 L.Ed. 643 (1881); Flowers v. Aetna Casualty and Surety Company, 163 F. 2d 411, 415 (C.A. 6, 1967); Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957); Southern Pacific Company v. Haigt, 126 F. 2d 900 (C.A. 9, 1942).

The removal ends the power of the State Court to issue process because the entire case has been removed. Allman v. Hanley, 302 F. 2d 559 (C.A. 5, 1962). See also Adair Pipeline Company v. Pipeliners Local Union No. 798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd 325 F. 2d 206 (C.A. 5, 1962), wherein it was held that presentation to the Judge of a State Court, in open court, at hearing on the plaintiff's motion for temporary injunction, of a copy of a petition to remove the case to Federal Court, which the Judge was obligated to turn over to the Clerk of the State Court, regardless of whether he actually did so, was sufficient compliance by defendants' attorney with statutory requirement that copy of petition for removal must be promptly filed with the Clerk of the State Court and the Judge of the State Court was put on notice that the case had been removed and that he could proceed no further therein." (Emphasis supplied.)

After compliance with the removal statute, the State Court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are Federal questions which must be decided in Federal Court. Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957).

For the above reasons, defendants having complied with the removal statute, it is respectfully suggested that this Court no longer has any jurisdiction in this matter and is without power to proceed further.

435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

TED IORIO, Esquire

Suite 2005
1175 Peachtree St., N.E.
Atlanta, Georgia
(404)892-8890

GILBERT H. DEITCH, Esquire

ATTORNEYS FOR DEFENDANTS

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel
LAWRENCE S. HUFFMAN

Respondent

-vs-

WILLIAM H. DAKOTA, et al

Petitioners

CASE NO. C 73-176

MOTION TO REMAND

Judge Young

Respondent respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S. C. Section 1443; and
2. This action is not a case within 28 U.S.C. Section 1343; and
3. This action is barred under the doctrine of res judicata; and
4. Petitioners can effectively and adequately enforce their First Amendment rights to freedom of speech in the state court action.

Respondent further moves the Court for an order directing petitioners to pay to respondent all expenses and disbursements incurred by respondent by reason of the removal proceedings.

Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0756
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Remand was sent to attorney for Petitioners, Ted Ierie, 435 South Hawley

Street, Toledo, Ohio, on this ____ day of May, 1973, by regular U. S. Mail.

_____

FILED
Aug 14 4 03 PM '73
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE STATE OF OHIO, ex rel LAWRENCE S. HUFFMAN

Respondent

-vs-

WILLIAM H. DAKOTA, et al

Petitioners

CASE NO. C 73-176

MEMORANDUM IN SUPPORT OF MOTION TO REMAND.

... ...

This Federal District Court lacks subject matter jurisdiction as this action is not a civil rights case within 28 U.S.C., Section 1443.

In their petition, William H. Dakota, et al, hereinafter referred to as defendants, have alleged that this United States District Court has jurisdiction over the case at hand. The defendants contend that this is a type of civil action of which the district courts of the United States have original jurisdiction under 28 U.S.C., Section 1443 (Civil Rights) and which may be removed to a federal district court pursuant to 28 U.S.C., Section 1441 (B).

With regard to the defendants' contention that 28 U.S.C., Section 1443 gives this Federal District Court jurisdiction, it is respectfully submitted that the well reasoned opinion and decision in State of Ohio, ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case #C 72-28 in this United States District Court for the Northern District of Ohio, Western Division, is dispositive of such contention. A copy of said opinion and order is attached hereto, marked Exhibit A and incorporated herein by reference.

Defendants allege that plaintiff, State of Ohio, ex rel Lawrence S. Huffman, has conspired to intimidate and harass the defendants from exhibiting such films as the local exhibitors choose. They contend

that in furtherance of this conspiracy plaintiff has instituted numerous actions similar to the instant case under authority of a state statutory scheme allowing individuals to act in the place of the state attorney general or prosecutor in enforcing the public nuisance laws. Because the film owners' or exhibitors' first amendment rights to free speech were not found to prevail in any of the cases prior to removal to this Federal District Court, defendants argue that they cannot enforce their first amendment rights as citizens of the United States to freedom of speech and of the press in the Court of Common Pleas of Allen County, Ohio, and that, therefore, they are entitled to call upon the jurisdiction of this federal court for a final adjudication of the matter, pursuant to 28 U.S.C. Section 1443.

As the following analysis will show, this Federal Court lacks jurisdiction over the subject matter because this action is not a civil rights case within the meaning of 28 U.S.C. 1443, and removal of such case was therefore not proper.

In providing for the removal of certain civil rights cases, Section 1443 reads as follows:

> "Any of the following civil acts or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "1. Against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> "2. For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." (Emphasis added)

A simple reading of this section reveals that the Court of Appeals for the Fourth Circuit was correct in describing the language of this section as "exquisite obscurity." See Baines v. Denville, 357 F. 2d 756 (4th Circ., 1966).

The scope of the civil rights removal statute, 28 U.S.C.

Section 1443, was considered and construed, by the United States Supreme Court, in Georgia v. Rachel, 384 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

1. That the right . . . is a right under any law providing for . . . equal civil rights, and

2. That the petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F. 2d 595 (7th Circ. 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. . .
>
> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' 'When the removal statute speaks of "any law providing for equal rights," it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (Citation omitted). (Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443(1)

under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966), the Supreme Court held that Section 1443 (1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443 (2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the first amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443 (1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the first amendment."

From Peacock, it is obvious that defendants are not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish, as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F. 2d 1067, 1070 (4th Cir. 1971):

"The defendant must show that there is a basis for a

> firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443(1). The sole ground cited by the defendants in their petition for removal of this case, pursuant to 28 U.S.C. Section 1443(1) was that they cannot enforce in the Court of Common Pleas of Allen County, Ohio, their first amendment rights as citizens of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendants' broad contention that they cannot enforce their first amendment rights to freedom of speech in the State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendants in their petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that they cannot enforce their first amendment rights to freedom of speech in the state courts. Because their petition for removal failed to make any showing whatever that they are being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendants are not entitled to removal of this case pursuant to 28 U.S.C., Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al, in Case No. C72-28,

is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendants' allegation of jurisdiction by means of 28 U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.S. Section 1441.

Defendants also contend that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in their petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendants' contention, they claim that enforcement of the Ohio Nuisance Statutes, Sections 3767.01 et seq., violates their constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District Court lacks jurisdiction because the plaintiffs' action is one to abate a public nuisance; that it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F. Supp. 281, at 282, and 28 U.S.C., Section 1441(B):

". . .The City derives its authority to seek an injunctio

injunction against this 'nuisance' not from Federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health of its citizens . . ."

And in Grove Press, Inc., case, the Court also stated at page 292 the following:

"Although it is likely that the alleged obscenity of 'I am Curious -- Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.

"The City's prayer for an injunction in the state court neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this "nuisance" not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.

"The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc., v. Prince George County Cong. of Racial Eq., 221 F. Supp. 341, 344 (D.Md., 1963) . . .

"Furthermore, the defendant s have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-334 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes removing an action here pursuant to Title 28 U.S.C., Section 1441."

In the instant case, the defendants are unable to show that their First Amendment rights have not, are not, or would not be protected in the state courts. Secondly, their mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter. And finally, Chapter 3767 of the Ohio Revised Code has been unequivocally declared constitutional by this Court in Grove Press, Inc., v. Flask, 325 F. Supp, 574 (1970) under standards and utilizing procedures outlined by this Court in Pursue, Ltd. v. Lawrence S. Huffman, Case No. C72-432, more specifically, conducting a prior adversary hearing as to obscenity in an effort to enforce the state court injunction which prohibits the exhibition of obscene films at the subject nuisance premises.

Further, respondent contends that petitioners are barred under the doctrine of res judicata from bringing this action utilizing the same grounds for relief as that sought by the same petitioners by a similar action in this Court in Case No. 72-445 which was disaissed by this Court on April 26, 1973. See McLaughlin Bros. v. Hollowell, 228 U.S. 278, 33 S. Ct. 465; Whitcomb v. Smithson, 175 U.S. 635, 20 S. Ct. 248; St. Paul & C. R. Co. v. McLean, 108 U.S. 212, 2 S. Ct. 498.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Gary R. Ferron
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed to attorney Ted Iorio, 435 South Hawley Street, Toledo, Ohio, this 7th day of May, 1973.

_____

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO ex rel LAWRENCE S. HUFFMAN :
:
Respondent : CASE NO. C 73-176
:
-vs- :
: MOTION FOR IMMEDIATE HEARING
WILLIAM H. DAKOTA et al :
:
Petitioners :
:

.. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

_____
Gary R. Harmon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR RESPONDENT

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on ex parte application.

In September, 1972, respondent filed a complaint in equity in the Court of Common Pleas of Allen County, Ohio, seeking to enjoin the continuous exhibition of obscene motion picture films and to abate the same as a public nuisance in Allen County and in the State of Ohio. The Complaint was filed pursuant to Sections 3767.01 et seq., of the Ohio Revised Code. Respondent further applied for a preliminary injunction which application was heard by the Court of Common Pleas and after due deliberation, the Court did grant a preliminary injunction on October 24, 1972.

On November 30, 1972, the Common Pleas Court of Allen County, Ohio, issued a permanent injunction finding that a nuisance existed at #69 Public Square, Lima, Ohio, and permanently enjoined the exhibition of obscene motion picture films at said location.

On April 20, 1973, the Court in Pursue, Ltd. v. Lawrence S. Huffman, et al, Case No. 72-432, held those provisions of Chapter 3767 of the Ohio Revised Code which provided for the literal closure of a premises in which a nuisance has been maintained unconstitutional, and enjoined the defendants therein from executing ONLY that portion of the State court order which provided for closure. (See Exhibit A). The State court injunctions which prohibited the continuation, in effect, the perpetuation of the nuisance, to wit: the exhibition of obscene motion picture films, however, remained undisturbed by the federal court order. (See Exhibits B and C).

On April 26, 1973, this Court in State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al, Case No. 72-445, dismissed sua sponte the pending removal action thereby returning such case to the jurisdiction of the Allen County, Ohio, Court of Common Pleas. (See Exhibit D).

On May 1, 1973, the plaintiff in the State case filed his verified Motion (See Exhibit E) in the State court requesting an adjudication as to obscenity of the motion picture films being exhibited at the

subject nuisance premises. The State Court ordered that such a hearing be conducted on May 3, 1973 (See Exhibit F). The Petition for Removal filed herein on May 3, 1973, forced the cancellation of the State court proceeding by virtue of its mere filing (whether meritorious or fraudulent) causing the termination of the State court's jurisdiction.

Respondent contends that petitioners are barred under the doctrine of res judicata from bringing a second Petition for Removal. It is elementary that a second petition for removal cannot be made on the same grounds as the first one as is the case here. (See McLaughlin Bros. v. Hallowell, 228 U.S. 278, 33 S. Ct. 465; Whitcomb v. Smithson, 175 U.S. 635, 20 S. Ct. 248; St. Paul & C.R. Co. v. McLean, 108 U.S. 212, 2 S. Ct. 498)

As respondent has argued in prior matters arising out of activities conducted at the subject nuisance premises which have resulted in actions before this Court, the petitioners are flagrantly abusing the federal judicial process urging federal court intervention while continuing their unlawful conduct by exhibiting the crudest imaginable hard core pornographic obscene motion picture films and reaping the profits of this unlawful undertaking by filing actions of the nature presently before the Court. In support of this contention respondent attacks hereto Exhibit G, an affidavit of a law enforcement officer describing the three motion pictures which were to be scrutinized by the State court prior to the filing of the Petition for Removal in this case.

Respondent further submits that this matter was awaiting a prior adversary hearing on the obscenity of motion picture films being exhibited at #69 Public Square, Lima, Ohio, time is of the essence, and the matter is pressing. Unless this Court orders an immediate hearing on respondent's motion to remand, respondent's rights to have the motion picture films being exhibited at #69 Public Square, Lima, Ohio, declared obscene and abated as a public nuisance will be substantially prejudiced and a great injustice will result.

Gary K. Hermon
Assistant Prosecuting Attorney

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing with attached Memorandum was mailed by regular U. S. Mail this _____ day of May, 1973, to Ted Iorio, 435 South Hawley Street, Toledo, Ohio 43609, attorney for Petitioners.

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff for Allen County, Ohio, and that at approximately 12:30 p.m., on May 1, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures, "Back Door", "Just Married", and "Bob Dick".

Affiant says that he did see three motion picture films while at the said Cinema I Theater and that the first film he observed had no introduction as to title, producer, actors or other identifiable features. The plot of the first movie apparently entitled "Back Door" revolved about three neighborhood couples who exchanged partners for various sexual acts. Depicted upon the screen during said film were nude males and females performing acts of sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicit as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further, that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen of the female vagina. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming

from the said male penis and being licked by the said female.

Affiant says that the next motion picture which he saw on said date had no introduction or other identifiable feature, however, it is assumed by the affiant to be the motion picture film entitled "Bob Dick". The film was about a hillbilly couple who agreed to, for a substantial sum of money, appear in a pornographic movie. The film contained solely various scenes of nude males and females performing sexual intercourse, fellatio, and cunnilingus, all of which were performed as explicity as above described in the prior motion picture.

Affiant says that the third motion picture was apparently entitled "Just Married" although no introduction to the movie was depicted on the screen. Affiant says that the plot of said motion picture film was about a man and woman just married who are instructed by another couple on sex.

Affiant says that the entire movie depicted upon the screen nude males and females performing actual intercourse, fellatio, and cunnilingus. Affiant says that all of said sexual acts were actual and non-simulated and that the camera, as in the other two motion picture films, would constantly focus in upon the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this ____ day of May, 1973.

_____

FILED
MAY 22 3 52 PM '73
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio,
Plaintiff,
vs.
William H. Dakota,
Defendant.

Civil No. C 73-176

O R D E R

This cause came to be heard upon motion of the plaintiff for an immediate hearing on its motion to remand this action to the Court of Common Pleas of Allen County, Ohio. For good cause appearing, it is

ORDERED that the motion of the plaintiff should be and hereby is overruled.

United States District Judge

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on MAY 22 1973

Dominic J. Cimino, Clerk

Toledo, Ohio.

Appendix V

State of Ohio v. Robert Smith, 73 CR 093
(Being a Criminal Case filed on May 4, 1973
in the Court of Common Pleas of Allen County,
Ohio)

Papers Included in Appendix:	Page
Affidavit of Lawrence S. Huffman, filed May 4, 1973.	3
Motion for Prior Adversary Hearing, filed May 4, 1973.	4
Affidavit of Deputy Sheriff Fred Hawk re films "Back Door", "Just Married" and "Bob Dick"	5-6
Journal Entry filed May 4, 1973	7
Summons for Robert Smith, filed May 4, 1973.	8-9
Supena Duces Tecum Re films "Back Door" "Just Married" and "Bob Dick", filed May 4, 1973. . . .	10

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	
Plaintiff	:	CASE NO. 73 CR 093
-vs-	:	AFFIDAVIT
ROBERT SMITH	:	
Defendant	:	
	:	

.. ..

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 1st day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: three motion picture films purportedly entitled "Back Door", "Just Married" and"Bob Dick", contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and subscribed in my presence, this _____ day of May, 1973.

_____
Deputy Court Reporter, Allen County Common Pleas Court. Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	
Plaintiff	:	CASE NO. 73 CR 093
-vs-	:	
ROBERT SMITH	:	MOTION FOR PRIOR ADVERSARY HEARING
Defendant	:	
	:	

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 1, 1973, and purportedly entitled "Back Door", "Just Married" and "Bob Dick".

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary K. Lemon
Assistant Prosecuting Attorney
Allen County, Ohio
ATTORNEY FOR STATE OF OHIO

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

FRED HAWK, being first duly sworn, says that he is a deputy sheriff for Allen County, Ohio, and that at approximately 12:30 p.m., on May 1, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures, "Back Door", "Just Married", and "Bob Dick".

Affiant says that he did see three motion picture films while at the said Cinema I Theater and that the first film he observed had no introduction as to title, producer, actors or other identifiable features. The plot of the first movie apparently entitled "Back Door" revolved about three neighborhood couples who exchanged partners for various sexual acts. Depicted upon the screen during said film were nude males and females performing acts of sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicit as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further, that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen of the female vagina. Affiant says that said film contained a segment in which the famale inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming

from the said male penis and being licked by the said female.

Affiant says that the next motion picture which he saw on said date had no introduction or other identifiable feature, however, it is assumed by the affiant to be the motion picture film entitled "Bob Dick". The film was about a hillbilly couple who agreed to, for a substantial sum of money, appear in a pornographic movie. The film contained solely various scenes of nude males and females performing sexual intercourse, fellatio, and cunnilingus, all of which were performed as explicity as above described in the prior motion picture.

Affiant says that the third motion picture was apparently entitled "Just Married" although no introduction to the movie was depicted on the screen. Affiant says that the plot of said motion picture film was about a man and woman just married who are instructed by another couple on sex.

Affiant says that the entire movie depicted upon the screen nude males and females performing actual intercourse, fellatio, and cunnilingus. Affiant says that all of said sexual acts were actual and non-simulated and that the camera, as in the other two motion picture films, would constantly focus in upon the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this ____ day of May, 1973.

_____

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

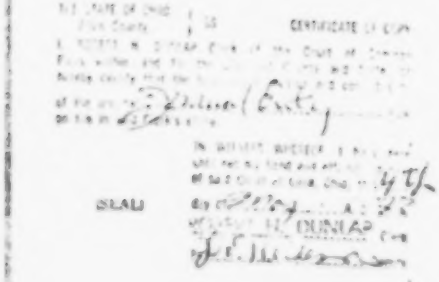
THE STATE OF OHIO	:	73CR 053
Plaintiff	:	CASE NO. _____
-vs-	:	
ROBERT SMITH	:	JOURNAL ENTRY
Defendant	:	
	:	

This matter came on to be heard upon the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled "Back Door", "Just Married", and "Bob Dick", be conducted at Courtroom # 2, before one of the Honorable Judges of the Common Pleas Court, on May 7, 1973, at 1:30 P.M.

_____
JUDGE



IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff : CASE NO. 73 CR 099
-vs- :
ROBERT SMITH : SUMMONS
Defendant :
:

.. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO:

You are hereby commanded to notify Robert Smith that he has had an affidavit filed against him by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 1st day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: three motion picture films purportedly entitled "Back Door", "Just Married" and "Bob Dick", contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

s/Lawrence S. Huffman

Sworn to and subscribed before me this 4 day of May, 1373.

s/ Gary P Ikerman
~~Deputy Clerk~~ Notary Public

Robert Smith must appear in Common Pleas Court on May 7,

1973, at 1:30 P.M., in Courtroom # 2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By_____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By_____

RETURN

Sheriff's Office, Lima, Ohio, _____, 1973.

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof, with the endorsements thereon _____

_____

_____.

EDWARD L. FAIR, SHERIFF

By_____
Deputy Sheriff

CR. 18

Subpena Duces Tecum

CRIMINAL
CASE

R.C. 2317.13; 2935.22

Revised Code Sec. 2317.13, 2317.07, 311.17

The State of Ohio, Allen County. Common Pleas Court

To Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

Otis Hatfield, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

You are hereby required to be and appear before the Common Pleas Court at the Court House in said County, on the day of May *A. D. 19 73,*
at o'clock *M., to testify as a witness in a certain case pending in said Court, wherein* The State of Ohio *Plaintiff*
and Robert Smith *Defendant;*
and also that you bring with you and produce at the time and place aforesaid

three motion picture films purportedly entitled "Back Door"
"Just Married" and "Bob Dick" exhibited at the Cinema I Theater
#69 Public Square, Lima, Ohio

and not depart the Court without leave. Herein fail not, under penalty of the law. And have you then and there this writ.

Said Court requires your said attendance on behalf of the State of Ohio
WITNESS my hand and the seal of said Court,
this 11 *day of* May *19* 73

Robert H. Shimp Clerk
By Donald E. Niederman Deputy

Appendix W

Robert Smith v. State of Ohio, C73-180,
(being a Removal Action in the United
States District Court for the Northern
District of Ohio, Western Division)

Papers Included in Appendix:	Page
Petition for Removal, filed May 7, 1973, (Less Exhibits A-6)	3-6
Notice of Removal, filed May 7, 1973	7
Memorandum of Law on Effect of Removal on State Court Action, filed with Allen County Common Pleas Court on May 7, 1973	8-9
Motion to Remand, filed May 14, 1973	10
Memorandum in Support of Motion to Remand, filed May 14, 1973	11-17
Motion for Immediate Hearing, and Memorandum in Support Thereof, filed May 14, 1973	18-20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE STATE OF OHIO	*	CASE NO. 73CR 093
Plaintiff	*	
	*	
vs	*	
ROBERT SMITH	*	
Defendant	*	

PETITION FOR REMOVAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

The Petition of ROBERT SMITH shows:

1.

On or about May 4, 1973, an affidavit was filed in the Court of Common Pleas of Allen County, Ohio, in an action entitled THE STATE OF OHIO VS. ROBERT SMITH, Case No. 73CR 093, the affiant being LAWRENCE S. HUFFMAN, Prosecuting Attorney of Allen County, Ohio. (Affidavit attached hereto as Exhibit A)

2.

The affidavit of the aforesaid alleges that the defendant, ROBERT SMITH, did on or about May 1, 1973, exhibit three motion picture films knowing the same to be obscene in violation of Ohio Revised Code, Section 2905.34.

3.

Petitioner was served with a summons to notify him of the above-mentioned allegation and commanding him to appear in the

Court of Common Pleas of Allen County, Ohio, on May 7, 1973, to answer said affidavit. (Summons attached hereto as Exhibit B)

4.

Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio, filed a Motion For Prior Adversary Hearing to determine whether the three motion picture films are obscene, with an affidavit in support of his motion. (Motion For Prior Adversary Hearing and Affidavit attached hereto as Exhibit C)

5.

Petitioner, ROBERT SMITH, was served with a subpoena duces tecum to appear as a witness in the case against himself and was further directed to "bring with you and produce at the time and place aforesaid three motion picture films purportedly entitled 'Back Door', 'Just Married', and 'Bob Dick' exhibited at the Cinema I Theater 869 Public Square, Lima, Ohio" (Subpoena Duces Tecum attached hereto as Exhibit D)

6.

The above-described action is a criminal action which may be removed to this Court by the Petitioner, pursuant to the provisions of 28 U.S.C. §1443, in that Petitioner cannot enforce, in the Courts of the State of Ohio, rights guaranteed him under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

7.

Said action is removable specifically because the procedure employed by respondent herein, acting by and through Prosecutor Lawrence S. Huffman and Gary R. Hermon of Allen County, will be held by the Supreme Court of Ohio, as so ruled most recently, upholding the Court of Appeals of Ohio which decided that an individual can be made to produce a motion picture film notwithstanding his Fourth and Fifth Amendment rights. (Exhibit E)

8.

Petitioner shows that local prejudices have been so inflamed by the Court's action as well as actions and statements of the prosecutor of Allen County, that it will be impossible for him to protect his Fourth and Fifth Amendment rights in the Court of Common Pleas of Allen County.

9.

Said action is also removable pursuant to 28 U.S.C. §1441 (b) in that it is an action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, in that

(a) The District Courts have jurisdiction under 28 U.S.C. §1343, to redress deprivation of the civil rights of Petitioner, to-wit, a denial of his rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) Petitioner re-alleges his allegations in Paragraph 6 and 8, and incorporate them as Paragraph 9 (b) hereof.

10.

Petitioner files herewith a bond with good and sufficient surety conditioned, as provided by 28 U.S.C. §1446 (d), that they will pay all costs and disbursements incurred by reason of the removal proceedings brought hereby, should it be determined that this action is not removable, or is improperly removed.

WHEREFORE, Petitioner prays that the action now pending against him in the Court of Common Pleas of Allen County, Case No. 73CR 093 be removed therefrom to this Court for the reasons set out hereinbefore.

Respectufily submitted,

TED IORIO, Esquire
435 South Hawley Street
Toledo, Ohio 43609
(419) 248-5351

W-6

GILBERT N. DEITCH, Esquire
Suite 2005, 100 Colony Square
1175 Peachtree Street, N. E.
Atlanta, Georgia 30361

BY: Ted Iorio
ATTORNEYS FOR PETITIONER

STATE OF OHIO)
)SS:
COUNTY OF LUCAS)

VERIFICATION

Personally appeared before me, the undersigned, Ted Iorio, Attorney for Petitioner herein, and after first being duly sworn deposes and says that the facts alleged in the above and foregoing Petition for Removal are true and correct, to the best of his current knowledge, information and belief.

Ted Iorio

Sworn to and subscribed before me, this 7th day of May, 1973.

Jacqueline A. Wages
Notary Public

JACQUELINE A. WAGES
Notary Public, Lucas County, Ohio
My Commission Expires March 10, 1975

CERTIFICATION

This is to certify that on the 7th day of May, 1973, a true and exact copy of the foregoing was served upon Lawrence S. Huffman, Allen County Courthouse, Lima, Ohio.

Ted Iorio

W-7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio)
)
Respondent)
) Civil Action No. C 73-180
-vs-)
) NOTICE OF REMOVAL
Robert Smith)
)
Petitioner)
)

To: Robert H. Dunlap
Clerk of Courts
Allen County Court House
Lima, Ohio

To: Lawrence S. Huffman
Prosecuting Attorney
127 N. Prospect Street
Lima, Ohio 45802

You, and each of you, are hereby notified that on the 7th day of May, 1973, Robert Smith filed in the District Court for the Northern District of Ohio, Western Division, a Petition for Removal of Cause No. 73CR 302, in the Court of Common Pleas of Allen County and entitled The State of Ohio, Plaintiff v Robert Smith, Defendant.

Ted Iorio

Dated this 7th day of May, 1973.

STATE OF OHIO)
)SS:
COUNTY OF LUCAS)

I, Ted Iorio, being first duly sworn, say that the foregoing notice and copy of petition for removal have been hand delivered to Robert H. Dunlap, Clerk of Courts, Allen County Court House, Lima, Ohio, and Lawrence S. Huffman, Prosecuting Attorney, 127 N. Prospect Street, Lima, Ohio, this 7th day of May, 1973.

Ted Iorio

Sworn to before me and subscribed in my presence this 7th day of May, 1973.

Notary Public

JACQUELINE A. WAGES
Notary Public, Lucas County, Ohio
My Commission Expires March 10, 1975

IN THE COURT OF COMMON PLEAS OF
ALLEN COUNTY, OHIO

STATE OF OHIO :

Plaintiff, :

v. : CASE NO. 73 CR 093

ROBERT SMITH :

Defendant. :

MEMORANDUM OF LAW ON EFFECT
OF REMOVAL ON STATE COURT ACTION

It is brought to the Court's attention that the above styled action has been removed to the United States District Court for the Northern District of Ohio, Western Division. This memorandum is intended to show the effect of said removal upon the above styled action.

The filing of a petition for removal under the statutes governing the procedures for removal effects an automatic removal from State Court to Federal District Court, and such removal stops any further proceeding in State Court pending the District Court's action. 28 U.S.C. §1446(e).

Compliance with the form and procedure of removal under 28 U.S.C. §1446 is all that is necessary to effect automatic removal from the State Court to the District Court. Baltimore & Ohio Railroad Company v. Koontz, 104 U.S. 5, 14, 26 L.Ed. 643 (1881); Flowers v. Aetna Casualty and Surety Company, 163 F. 2d 411, 415 (C.A. 6, 1967); Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957); Southern Pacific Company v. Haigt, 126 F. 2d 900 (C.A. 9, 1942).

The removal ends the power of the State Court to issue process because the entire case has been removed. Allman v. Hanley, 302 F. 2d 559 (C.A. 5, 1962). See also Adair Pipeline Company v. Pipeliners Local Union No. 798, 203 F. Supp. 434 (D.C. Texas 1962), aff'd 325 F. 2d 206 (C.A. 5, 1962), wherein it was held that presentation to the Judge of a State Court, in open court, at hearing on the plaintiff's motion for temporary injunction, of a copy of a petition to remove the case to Federal Court, which the Judge was obligated to turn over to the Clerk of the State Court, regardless of whether he actually did so, was sufficient compliance by defendants' attorney with statutory requirement that copy of petition for removal must be promptly filed with the Clerk of the State Court and the Judge of the State Court was put on notice that the case had been removed and that he could proceed no further therein. (Emphasis supplied.)

After compliance with the removal statute, the State Court is deprived of jurisdiction to proceed with any phase of the litigation. Any issues as to the propriety of removal are Federal questions which must be decided in Federal Court. Lowe v. Jacobs, 243 F. 2d 432 (C.A. 5, 1957).

For the above reasons, defendants having complied with the removal statute, it is respectfully suggested that this Court no longer has any jurisdiction in this matter and is without power to proceed further.

435 S. Hawley Street
Toledo, Ohio 43609
(419) 248-5351

TED IONIO, Esquire

Suite 2005
1175 Peachtree St., N.E.
Atlanta, Georgia
(404)892-8890

GILBERT H. DEITCH, Esquire

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO :

Plaintiff : CASE NO. C73-180

-vs- :

ROBERT SMITH : JUDGE DON J. YOUNG

Defendant : MOTION TO REMAND

:

.. ..

Plaintiff respectfully moves the Court for an order remanding this cause to the Court of Common Pleas of Allen County, Ohio, on the ground that the cause was improperly removed and is not within the jurisdiction of this Court for the following reasons:

1. This action is not a civil rights case within 28 U.S.C. Section 1443; and

2. This action is not a civil action within 28 U.S.C. Section 1441(b); and

3. This action is not a civil action within 28 U.S.C. 1343.

4. Defendants can effectively and adequately enforce their First Amendment rights to freedom of speech inthe state court action.

Plaintiff further moves the Court for an order directing defendant to pay to plaintiff all expenses and disbursements incurred by plaintiff by reason of the removal proceedings.

Gary R. Hermon
Assistant Prosecuting Attorney
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion to Remand was mailed by regular U. S. Mail this ____ day of May, 1973, to attorney for defendant, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE STATE OF OHIO :

Plaintiff : CASE NO. C73-180

-vs- : JUDGE DON J. YOUNG

ROBERT SMITH : MEMORANDUM IN SUPPORT OF MOTION TO REMAND.

Defendant :

:

.. ..

The State of Ohio contends that the Federal District Court lacks jurisdiction in that the bases for removal as set forth in defendant's petition for removal are insufficient.

In his petition, Robert Smith, hereinafter referred to as the defendant, has alleged that this United States District Court has jurisdiction of the case at hand. The defendant contends that this is an action which may be removed to a Federal District Court pursuant to Title 28, United States Code, Section 1441(b) and Title 28, United States Code, Section 1443.

Section 1441 describes actions removeable generally and specifically subsection (b) provides as follows:

> "Any civil (my emphasis) action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties, or laws of the United States, shall be removeable without regard to the citizenship or residence of the parties."

The case which defendant seeks to remove herein is a criminal case. A criminal affidavit has been filed against the defendant charging him with exhibiting obscene motion picture films in contravention of Revised Code 2905.35, a criminal offense, conviction of which may result in fine and imprisonment. Therefore, the action which defendant attempts to remove is a criminal action and not a civil action as required by subsection (b) of section 1441.

The defendant further cites as authority for removal, Section 1443

of Title 28 of the United States Code contending that he cannot enforce in the courts of the State of Ohio rights guaranteed him under the 4th, 5th, and 14th amendments to the Constitution of the United States. While Section 1443 includes both civil actions and criminal prosecutions, the matter pending must be "against any person who is denied or cannot enforce in the courts of such state a right under any law providing for the equal civil rights (my emphasis) of citizens in the United States or for all persons within the jurisdiction thereof."

The scope of the civil rights removal statute, 28 U.S.C. Section 1443, was considered and construed by the United States Supreme Court in Georgia v. Rachel, 334 U.S. 780 (1966) and its companion case of Greenwood v. Peacock, 384 U.S. 808 (1966).

On review, the Supreme Court in Rachel construed Section 1443 (1) as requiring a showing of two elements to permit removal:

1. that the right . . . is a right under any law providing for . . . equal civil rights, and

2. that petitioner is denied or cannot enforce that right in the state courts.

The court also said that the first element must be construed to mean any law providing for specific civil rights stated in terms of racial equality. See Evanston v. Buick, 421 F. 2d 595 (7th Circ., 1970).

In writing for a majority of the Supreme Court in Rachel, Mr. Justice Stewart said, at pages 791-792:

> ". . . we conclude, therefore, that the model for the phrase 'any law providing for . . . equal civil rights' in Section 641 was the Civil Rights Act of 1866.
>
> "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality . . .
>
> "On the basis of the historical material that is available, we conclude that the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443,

> because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443 demands. As the Court of Appeals for the Second Circuit has concluded, Section 1443 'applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . .' When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent equal rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. Section 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." (citation omitted). (Emphasis added).

Thus, the test for removal pursuant to 28 U.S.C. Section 1443 (1) under Rachel is whether a petitioner is denied or cannot enforce in a state court a right given by a federal statute providing for a specific civil right in terms of racial equality.

In the companion case of Greenwood v. Peacock, 384 U.S. 808 (1966) the Supreme Court held that Section 1443(1) operated only where a state law rendered it impossible for defendants to enforce their civil rights in State courts or where the mere prosecution violated a federal equal rights law, and that Section 1443(2) confers the privilege of removal only on federal officers or agents and those authorized to act with or for them in affirmatively executing duties under federal law providing for equal civil rights. In all other cases the state courts should have a chance to enforce the defendants' rights, no matter how their rights had been denied by State administrative officials in advance of the trial.

In addition, the Supreme Court in Peacock specifically held that "the First Amendment rights of free expression . . . so heavily relied upon in the removal petitions, are not rights arising under a law providing for 'equal civil rights' within the meaning of Section 1443(1), and that the reference in Section 1443(1) . . . to 'equal civil rights' . . . does not include the broad constitutional guarantees of the First Amendment."

From Peacock it is obvious that defendant is not within the purview of Section 1443(2), and this subsection will therefore be disregarded for further purposes of this brief.

The net result of the Georgia v. Rachel, Greenwood v. Peacock dialogue is to establish as a prerequisite to removal of a pending civil action or criminal prosecution under 28 U.S.C. Section 1443(1), the necessity of showing that a defendant is being denied or cannot enforce rights guaranteed under a federal law "providing for specific civil rights stated in terms of racial equality." As stated in the case of South Carolina v. Moore, 447 F. 2d 1067, 1070 (4th Circ. 1971):

> "The defendant must show that there is a basis for a firm prediction that such rights will be denied in the State court or that the pendency of the prosecution without more, is a deprivation of such a federally protected right . . . he must show that his federally secured right of racial equality is denied by the pendency of the proceeding or by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of brining the defendant to trial in the state court."

Applying the reasoning of Rachel and Peacock to the present case, it is obvious that this action is not a civil rights case within 28 U.S.C. Section 1443 (1). The sole other ground cited by the defendant in his petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) was that he cannot enforce in the Court of Common Pleas of Allen County, Ohio, his first amendment rights as a citizen of the United States to freedom of speech. However, as the Rachel and Peacock decisions make clear, defendant's broad contention that he cannot enforce his first amendment rights to freedom of speech inthe State court cannot support a valid claim for removal and jurisdiction under Section 1443(1), because the guarantees of the First Amendment are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that Section 1443(1) demands.

As stated, the only ground relied upon by defendant in his petition for removal of this case pursuant to 28 U.S.C. Section 1443(1) is that he cannot enforce his first amendment rights to freedom of speech in the state courts. Because his petition for removal failed to make any showing whatever that he is being denied or cannot enforce rights guaranteed under a federal law providing for specific equal civil rights stated in terms of

racial equality, it is clear that under the holdings of the Rachel and Peacock cases defendant is not entitled to removal of this case pursuant to 28 U.S.C. Section 1443(1).

Finally, this court's well reasoned opinion (attached hereto and incorporated herein by reference) in State of Ohio ex rel Robert J. Anderson v. A Motion Picture Film Entitled "Together" et al in Case No. C72-28, is conclusively dispositive of the defendant's contention. In that case, it was held that:

> "Since First Amendment rights of free expression are not rights arising under a law providing for equal civil rights within the meaning of Section 1443(1) . . . the petitioners cannot support a valid claim herein for removal under 1443 by alleging denial of First Amendment rights."

The law therefore having been repeatedly and authoritatively so held, it is clear that the defendant's allegation of jurisdiction by means of 28. U.S.C. Section 1443(1) is totally and unequivocally without merit; and, because of the lack of subject matter jurisdiction, the cause should again be remanded to the state court.

An action to abate a public nuisance is not removable under 28 U.S.C. Section 1441.

Defendant also contends that 28 U.S.C. Section 1343 specifically creates the original jurisdiction of the federal district court, thus triggering the removal provisions of Section 1441(B), by stating in his petition for removal at paragraph 6(A) -- "The District Courts have jurisdiction under 28 U.S.C. Section 1343 to redress violations of the Civil Rights Act against Petitioners, to wit, a denial of their rights under the First, Fifth, and Fourteenth Amendments to the Constitution of the United States."

To paraphrase defendant's contention, he claims that enforcement of the Ohio statute Section 2905.35 violates his constitutional right of free speech.

The State of Ohio respectfully submits that this Federal District

Court lacks jurisdiction because it is the type of action as to which the Federal Court has neither original nor removal jurisdiction. See Grove Press, Inc., v. City of Philadelphia, 300 F. Supp. 281, at 292, and 28 U.S.C. Section 1441(b).

In the Grove Press Inc. case, the Court stated at page 292 the following:

> "Although it is likely that the alleged obscenity of 'I am Curious, Yellow' will be the critical issue in the state court proceeding, this court nevertheless cannot conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C., Section 1441 or supported by the policy considerations relevant to the removal problem.
>
> "The City's prayer for an injunction in the state courts neither constitutes a request . . . for a remedy expressly granted by an Act of Congress . . . nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this " "nuisance" not from federal law, but rather from sovereign power delegated to it . . . to protect the health and welfare of its citizens.
>
> "The Supreme Court has never indicated either that it is improper for states or municipalities to proscribe obscenity and prosecute those who sell and distribute obscene material, or that a state trial court or jury is unable to interpret and apply the appropriate constitutional standards. Significantly, the defendants have failed to cite any case removed solely on the basis that the defendants to the action planned to raise First Amendment defenses. Indeed, the only cited case which involves a factual situation similar to that involved here unequivocally holds that a plaintiff's anticipation of such defenses . . . would not mean that the cause of action alleged by plaintiff is founded on a claim or right arising under the Constitution . . . Levitt and Sons, Inc. v. Prince George County Corp. of Racial Eq., 221 F. Supp 541, 544 (D Md., 1963) . . .
>
> "Furthermore, the defendants have failed to draw any distinction between this case and thousands of other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses. State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims, and assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, of Dombroski, supra, it is not relevant for purposes of removing an action here pursuant to Title 28 U.S.C. Section 1441."

In the instant case, the defendant is unable to show that his First Amendment Right has not, is not, or would not be protected in the state courts. Secondly, his mere allegation of a violation of First Amendment rights does not create the requisite controversy arising under the United States Constitution to grant this court jurisdiction over the matter.

On the aforementioned authorities the plaintiffs respectfully submit that removal of the case at hand was not only improper, but that there is still no federal jurisdiction pursuant to 28 U.S.C. Sections 1443 and 1441(B), and that the case should again be remanded to the state courts for its adjudication.

Respectfully submitted,

Gary R. Herron
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR PLAINTIFF

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed by regular U. S. Mail this _____ day of May, 1973, to attorney for defendant, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

FILED
MAY 14 5 05 PM '73
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF OHIO

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO	:	
Plaintiff	:	CASE NO. 73-180
-vs-	:	JUDGE DON J. YOUNG
ROBERT SMITH	:	MOTION FOR IMMEDIATE HEARING
Defendant	:	
	:	

.. ..

Respondent respectfully moves the Court pursuant to Rule 6(D) of the Federal Rules of Civil Procedure for an immediate hearing on Respondent's Motion for Remand which is being filed herewith and for leave to serve a copy of his Motion for Remand and Notice of Hearing thereof within five (5) days of the time specified for the hearing.

Good cause exists for this Motion as is clearly set forth in the Memorandum in Support of this motion attached hereto and made a part hereof.

Respectfully submitted,

Gary R. Herman
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
ATTORNEY FOR PLAINTIFF

MEMORANDUM IN SUPPORT OF MOTION FOR IMMEDIATE HEARING ON MOTION FOR REMAND

This motion is being filed pursuant to Rule 6(D) of the Federal Rules of Civil Procedure which provides in material part as follows:

> "A written motion other than one which may be heard ex parte and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing unless a different period is fixed by these rules or by Order of the Court. Such an order for cause shown shall be made on

ex parte application . . . .?

On May 4, 1973, Lawrence S. Huffman, filed his affidavit in the Court of Common Pleas of Allen County, Ohio, charging Robert Smith with a violation of Revised Code Section 2905.35 for exhibiting obscene motion picture films. (See Exhibit A). At the same time the State of Ohio filed a Motion for Prior Adversary Hearing (See Exhibit B) which the Court ordered to be conducted on May 7, 1973. (See Exhibit C).

The Court issued a summons in lieu of an arrest warrant (See Exhibit D) requiring the appearance of the defendant in court on May 7, 1973.

On the evening of May 7, 1973, the defendant Robert Smith was served the aforementioned summons, affidavit, motion for prior adversary hearing, certified copy of the court order ordering a prior adversary hearing and a subpoena duces tecum. (See Exhibit E). At the same time, the projectionist of the Cinema I Theater, Otis Hatfield, was served an identical subpoena duces tecum.

On the day of the hearing, Robert Smith filed his petition for removal herein.

The petition for removal filed herein is completely without foundation in law. The statutory authority for such filing as reflected in said petition for removal is wholly without merit as shown in the State's Memorandum in Support of Motion to Remand which is hereby incorporated by reference.

The State of Ohio further submits that this matter was awaiting a prior adversary hearing on the obscenity of the three motion picture films which are the subject of the criminal affidavit and that time is of the essence and the matter is pressing.

Unless this Court orders an immediate hearing on the State of Ohio's Motion to Remand, the State of Ohio's right to have the motion

picture films which are the subject of the criminal affidavit declared obscene and proceed in the prosecution thereof will result in substantial prejudice against the State of Ohio.

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Motion for Immediate Hearing and Memorandum attached thereto was mailed by regular U. S. Mail this ____ day of May, 1973, to attorney for Defendant, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

State of Ohio,

Plaintiff,

vs.

Robert Smith,

Defendant.

Civil No. C 73-[illegible]

O R D E R

This cause came to be heard upon motion of the plaintiff for an immediate hearing on its motion to remand this action to the Court of Common Pleas of Allen County, Ohio. For good cause appearing, it is,

ORDERED that the motion of the plaintiff should be and hereby is overruled.

United States District Judge

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on MAY [illegible]

Dominic J. Cimino, Clerk

Toledo, Ohio.

Appendix X

State of Ohio v. Robert Smith, 73 CR 098, (being a Criminal Case, filed on May 8, 1973, in the Court of Common Please of Allen County, Ohio)

Papers Included in Appendix: Page

Affidavit of Lawrence S. Huffman, filed May 8, 1973. 3

Motion for Prior Adversary Hearing, filed on May 8, 1973. 4

Affidavit of Police Officer Dennis Harrod re films "The Wedding" and "Sex And The Working Girl". 5-6

Journal Entry, filed May 8, 1973. 7

Summons for Robert Smith, filed May 8, 1973. 8-9

Subpena Duces Tecum re films "The Wedding" and "Sex And The Working Girl". 10

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff : CASE NO. 73 CR 098
-vs- : AFFIDAVIT
ROBERT SMITH :
Defendant :
:

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled / The Wedding, and Sex and The Working Girl contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

FILED
1973 MAY -8 PM 3:45
ROBERT H. DUNLAP
CLERK OF COURTS
ALLEN CO. OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	73 CR 098
Plaintiff	:	CASE NO. _____
-vs-	:	
ROBERT SMITH	:	MOTION FOR PRIOR ADVERSARY HEARING
Defendant	:	
	:	

.. ..

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973, and purportedly entitled The Wedding, and Sex and The Working Girl.

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
ATTORNEY FOR STATE OF OHIO

Exhibit A

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

DENNIS HARROD, being first duly sworn, says that he is a Police Officer for the City of Lima, Allen County, Ohio, and that at approximately 12:30 p.m., on May 8, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures "The Wedding" and "Sex and The Working Girl".

Affiant says that he did see two motion picture films while at the said Cinema I Theater and that the first film he observed was entitled "Sex and the Working Girl". The plot of the first film movie revolved about a female teacher teaching sex to other female persons utilizing as an instructional guide other motion picture films. Depicted upon the screen were nude males and females performing acts of lesbianism, sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicitly as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen into the female vagina and female mouth.

Affiant says that the next motion picture film which he saw on said date at said location was entitled "The Wedding". The film was of a nature that affiant cannot with a reasonable degree of certainty summarize an apparent plot. The film revolved about sexual acts which were performed in apparently a photographic studio or modeling studio. The film contained various scenes of nude males and females performing sexual intercourse, cunnilingus, fellatio and lesbianism -- all of which were performed as

explicitly as above described in the prior motion picture. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female. Affiant says that all of said sexual acts were actual and non-simulated with penetration being clearly ascertainable and that the camera would constantly focus in on the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	73 CR 098
Plaintiff	:	CASE NO. _____
-vs-	:	JOURNAL ENTRY
ROBERT SMITH	:	
Defendant	:	

This matter came on to be heard upon the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled, The Wedding and Sex and The Working Girl be conducted at Courtroom # 2, before one of the Honorable Judges of the Common Pleas Court, on May 10, 1973, at 3:30 P.M.

H. Ernest A. Light
JUDGE

THE STATE OF OHIO, Allen County, ss. CERTIFICATE OF COPY

I, ROBERT H. DUNLAP, Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Court's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 8th day of May A.D. 1973

(SEAL) ROBERT H. DUNLAP, Clerk

By Frank Cohen, Deputy

ROBERT H. DUNLAP
CLERK OF COURTS
ALLEN CO., OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff :
-vs- :
ROBERT SMITH :
Defendant :

73 CR 098
CASE NO. _____

SUMMONS

TO THE SHERIFF OF ALLEN COUNTY, OHIO:

You are hereby commanded to notify Robert Smith that he has had an affidavit filed against him by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Robert Smith with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

/S/ Lawrence S. Huffman

Sworn to and subscribed before me this 8th day of May, 1973.

/S/ Gary R. Hermon
Notary Public

Robert Smith must appear in Common Pleas Court on May 10, 1973, at 2:30 P.M., in Courtroom # 1 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By _____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By _____

RETURN

Sheriff's Office, Lima, Ohio, _____, 1973.

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant by leaving a certified copy thereof, with the endorsements thereon _____

_____

_____.

EDWARD L. FAIR, SHERIFF

By _____
Deputy Sheriff

CR. 168

Subpena Duces Tecum

73 CR 098

CRIMINAL CASE

Revised Code, Sec. 2945.45

The State of Ohio, Allen County, Common Pleas Court

To the Sheriff of said County:

You are hereby commanded to subpena

Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

John Doe, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

to be and appear before the Common Pleas Court at the Court House in said County, on the 10th *day of* May *A. D. 19* 73, *at* 2:30 *o'clock* P *M., to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes* Robert Smith ;

and also to bring with them , *and produce at the time and place aforesaid.*

two motion picture films purportedly entitled The Wedding, and Sex and The Working Girl which were exhibited at Cinema I Theatre, #69 Public Square, Lima, Ohio, on May 8, 1973

; and not depart the Court without leave.

And therein to fail not, under penalty of the law; and to have then and there this writ.

Said Court requires said attendance of said witnesses on behalf of the State

WITNESS my hand and the seal of said Court, this

8th *day of* May 19 73

Robert N. Dunlap
Clerk

By Virginia Belopavlovich
Deputy

Appendix Y

State of Ohio v. Pursue Ltd., 73 CR 099,
(being a Criminal Case, filed on May 8, 1973,
in the Court of Common Pleas of Allen County,
Ohio)

Papers Included in Appendix:	Page
Affidavit of Lawrence S. Huffman, filed May 8, 1973	3
Motion for Prior Adversary Hearing	4
Affidavit of Police Officer Dennis Harrod, Re films "The Wedding" and "Sex And The Working Girl"	5-6
Journal Entry, filed May 8, 1973	7
Summons for Pursue Ltd., filed May 8, 1973	8-9
Subpena Duces Tecum Re films "The Wedding" and "Sex And The Working Girl"	10
Memorandum in Support of Service, filed May 10, 1973	11-12

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	73 CR 039
Plaintiff	:	CASE NO. _____
-vs-	:	AFFIDAVIT
PURSUE, LTD., a Delaware Corporation	:	
Defendant	:	
	:	

STATE OF OHIO
SS:
ALLEN COUNTY

Now comes LAWRENCE S. HUFFMAN, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Pursue, Ltd., a Delaware Corporation, with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl / contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

FILED
1973 MAY -8 PM 3:47
ROGER N. DOUGLAS
CLERK OF COURTS
ALLEN CO. OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff :
-vs- :
PURSUE, LTD. :
A Delaware Corporation :
Defendant :

73 CR 099

CASE NO. _____

MOTION FOR PRIOR ADVERSARY HEARING

Now comes the State of Ohio and moves the Court for an Order setting a hearing date certain for the purpose of conducting a prior adversary hearing as to the obscenity of the motion picture films exhibited at the Cinema I theater, #69 Public Square, Lima, Ohio, on May 8, 1973, and purportedly entitled The Wedding, and Sex and the Working Girl.

The State of Ohio further moves that the Court determine at such hearing whether or not said motion picture films are obscene and that upon a judicial determination that said motion picture films are obscene, the Court retain custody of said motion picture films until the trial of this cause.

In support of said motion, the State of Ohio attaches hereto and incorporates by reference an affidavit which is marked Exhibit A.

Respectfully submitted,

Gary R. Fernon
Assistant Prosecuting Attorney
Allen County, Ohio
ATTORNEY FOR STATE OF OHIO

FILED
MAY-8 PM 3:47
ROBERT H. PHILLIPS
CLERK OF COURTS
ALLEN CO. OHIO

Exhibit A

AFFIDAVIT

STATE OF OHIO
SS:
ALLEN COUNTY

DENNIS HARROD, being first duly sworn, says that he is a Police Officer for the City of Lima, Allen County, Ohio, and that at approximately 12:30 p.m., on May 8, 1973, affiant did pay the sum of $3.00 and thereby was admitted to the Cinema I Theater, #69 Public Square, Lima, Ohio.

Affiant says that the marquee of said theater advertised the following titled motion pictures "The Wedding" and "Sex and The Working Girl".

Affiant says that he did see two motion picture films while at the said Cinema I Theater and that the first film he observed was entitled "Sex and the Working Girl". The plot of the first film movie revolved about a female teacher teaching sex to other female persons utilizing as an instructional guide other motion picture films. Depicted upon the screen were nude males and females performing acts of lesbianism, sexual intercourse, fellatio and cunnilingus. Affiant says that all of said sexual acts were depicted as explicitly as such acts can be depicted in that the camera would focus in upon the actual sexual act in question and further that all of said sexual acts as depicted upon the screen were not simulated, but actually performed. The male penis was observed in a state of erection and actual penetration could be seen into the female vagina and female mouth.

Affiant says that the next motion picture film which he saw on said date at said location was entitled "The Wedding". The film was of a nature that affiant cannot with a reasonable degree of certainty summarize an apparent plot. The film revolved about sexual acts which were performed in apparently a photographic studio or modeling studio. The film contained various scenes of nude males and females performing sexual intercourse, cunnilingus, fellatio and lesbianism -- all of which were performed as

explicitly as above described in the prior motion picture. Affiant says that said film contained a segment in which the female inserted in her mouth an erect male penis and clearly depicted on the screen was semen coming from the said male penis and being licked by the said female. Affiant says that all of said sexual acts were actual and non-simulated with penetration being clearly ascertainable and that the camera would constantly focus in on the genitalia of the parties engaged in such sexual acts.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this 8th day of May, 1973.

_____
Notary Public

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	73 CR 099
Plaintiff	:	CASE NO. _____
-vs-	:	JOURNAL ENTRY
PURSUE, LTD. A Delaware Corporation	:	
Defendant	:	

This matter came on to be heard on the Motion of the State of Ohio for a prior adversary hearing.

The Court finds after due consideration of said motion together with the affidavit attached thereto that said motion is well taken, and accordingly,

IT IS ORDERED that a prior adversary hearing as to the obscenity of the motion picture films purportedly entitled The Wedding, and Sex and the Working Girl be conducted at Courtroom # 2, before one of the Honorable Judges of the Common Pleas Court, on May 10, 1973, at 2:30 P.M.

H. Ruscetta Hunt
JUDGE

THE STATE OF OHIO, Allen County, } ss CERTIFICATE OF COPY

I, ROBERT H. DUNLAP Clerk of the Court of Common Pleas within and for the aforesaid County and State, do hereby certify that the foregoing is a true and correct copy of the original Journal Entry now on file in said Clerk's office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Lima, Ohio, this 8th day of May, A.D. 1973

(SEAL) ROBERT H. DUNLAP, Clerk

By Robert H. Dunlap Deputy

FILED
1973 MAY 8 PM 4:08
ROBERT H. DUNLAP
CLERK OF COURTS
ALLEN COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO :
Plaintiff :
-vs- :
PURSUE, LTD., a Delaware Corporation :
Defendant :

73 CR 099
CASE NO. _____

SUMMONS

.. ..

TO THE SHERIFF OF ALLEN COUNTY, OHIO

You are hereby commanded to notify Pursue, Ltd., a Delaware Corporation that it has had an affidavit filed against it by Lawrence S. Huffman in the Common Pleas Court of Allen County, Ohio, as follows:

State of Ohio, Allen County, SS:

Now comes Lawrence S. Huffman, the duly elected and qualified Prosecuting Attorney of Allen County, Ohio, who being duly sworn according to law, deposes and says that on or about the 8th day of May, 1973, at the County of Allen aforesaid, one Pursue, Ltd., a Delaware Corporation, with knowledge of the contents and character of the obscene material did knowingly exhibit obscene material to wit: two motion picture films purportedly entitled The Wedding, and Sex and The Working Girl,
contrary to Section 2905.35 of the Ohio Revised Code and against the peace and dignity of the State of Ohio.

/S/ Lawrence S. Huffman

Sworn to and subscribed before me this 8th day of May, 1973.

/S/ Gary R. Hermon
Notary Public

Pursue, Ltd., a Delaware Corporation, must appear in Common Pleas Court on May 10, 1973, at 2:30 P. M., in Courtroom # 2 before one of the Honorable Judges to answer to said affidavit.

Clerk, Common Pleas Court

By _____
Deputy Clerk

I certify this to be a true copy of the original summons with all endorsements thereon.

_____

By _____

RETURN

Sheriff's Office, Lima, Ohio, _____, 1973

Received this writ _____, 1973, and on _____, 1973, I served the same on the defendant ty leaving a certified copy thereof with the endorsements thereon _____

_____

_____.

EDWARD L. FAIR, SHERIFF

By _____
Deputy

CR 68

Subpena Duces Tecum

CRIMINAL CASE

Revised Code, Sec. 2945.45

73 CR 099

The State of Ohio, Allen County, Common Pleas Court

To the Sheriff of said County:

You are hereby commanded to subpena

Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

John Doe, c/o Cinema I Theater, #69 Public Square, Lima, Ohio

to be and appear before the Common Pleas Court at the Court House in said County, on the 10th *day of* May *A. D. 19* 73, *at* 2:30 *o'clock* P.M., *to testify as a witness in a certain case pending in said Court, wherein the State of Ohio prosecutes* Pursue, Ltd., a Delaware Corporation ;

and also to bring with them , *and produce at the time and place aforesaid,*

two motion picture films purportedly entitled The Wedding, and Sex and the Working Girl which were exhibited at Cinema I Theatre #69 Public Square, Lima, Ohio, on May 8, 1973.

; and not depart the Court without leave.

And therein to fail not, under penalty of the law, and to have then and there this writ.

Said Court requires said attendance of said witnesses on behalf of the State

WITNESS my hand and the seal of said Court, this

day of May 19 73

Robert N. Dunlap Clerk

By Virginia Belgavlovich Deputy

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	
Plaintiff	:	CASE NO. 73 CR 099
-vs-	:	
PURSUE, LTD.	:	MEMORANDUM
Defendant	:	

.. ..

The following Memorandum of Law is submitted to the Court on the oral motion of the defendant, Pursue, Ltd., to quash service of process upon the defendant, Pursue, Ltd.

It is the position of the State of Ohio that service of summons upon a corporation shall be made as provided for service of summons upon corporations in civil actions.

Rule 4.2 of the Ohio Rules of Civil Procedure, subparagraph 6 provides that a corporation may be served by several methods, one of which is by serving a managing or general agent of the corporation. The return made by the Deputy Sheriff serving the summons upon Pursue, Ltd., reflects that said summons was served upon Robert Smith, agent of Pursue, Ltd.

It would appear to the State of Ohio that if such service of process is to be challenged, it is incumbent upon the defendant to show by way of evidence that Robert Smith is not an agent of said corporation. The record on its face reflects proper service in accordance with Rule 4.2 of the Ohio Rules of Civil Procedure. The State of Ohio contends that to

avoid process, the defendant must show that he is not the agent of Pursue, Ltd. The State has abundant evidence to the contrary.

Respectfully submitted,

Gary K. Hermon
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
ATTORNEY FOR STATE OF OHIO

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed by regular U. S. Mail this 14th day of May, 1973, to Ted Iorio, attorney for Pursue, Ltd., 435 South Hawley Street, Toledo, Ohio.

Appendix Z

State of Ohio v. Robert Smith, 73 CR 098, (being a Criminal Case, filed on May 8, 1973, in the Court of Common Pleas at Allen County, Ohio)

Papers Included in Appendix: Page

Journal Entry, filed May 11, 1973 of Contempt Citation against Robert Smith. 3-4

Journal Entry, filed May 11, 1973, of Contempt Citation against Otis Hatfield. 5-6

Robert Smith and Otis Hatfield v. Edward Fair, Sheriff of Allen County, Ohio, C73-187, (being a Petition for Habeus Corpus in the Federal District Court for the Northern District of Ohio, Western Division)

Order of Federal Judge Young, filed May 11, 1973, Admitting Smith and Hatfield to Bail. 7

Content of Petition for Writ of Habeas Corpus, received by phone on May 15, 1973. 8-9

Answer of Sheriff Fair, filed May 16, 1973 10

Memorandum in Support of Right of Law Enforcement to Require Production of Films (less Exhibits A-H). 11-15

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	
Plaintiff	:	CASE NO. 73 CR 098
-vs-	:	
ROBERT SMITH	:	JOURNAL ENTRY
Defendant	:	
	:	

This matter came on to be heard upon the appearance of Robert Smith, a witness subpoened in this cause by the State of Ohio, and said Robert Smith's failure to bring with him on May 10, 1973, at a prior adversary hearing two motion picture films which were exhibited at the Cinema I Theater, 109 Public Square, Lima, Ohio, on May 8, 1973.

The Court finds that Robert Smith was properly served a subpoena duces tecum in this cause on May 8, 1973. That said subpoena duces tecum required the said Robert Smith to appear on May 10, 1973, at 2:30 p.m., in this cause, and that said subpoena duces tecum did require Robert Smith to produce at the time and place aforesaid two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at Cinema I Theater, 109 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Robert Smith had in his possession, custody and control, two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at the Cinema I Theater

5

Jr. Entry

2. 2?

May 15th 73

Marjorie Grant

#69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Robert Smith has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10, 1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Robert Smith's failure to produce the films aforementioned, is a disobedience of process issued to him and as thereby a contempt of this Court.

It is therefore ORDERED that the said Robert Smith be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further Order of this Court that the said Robert Smith can purge himself of such contempt by the production of said motion picture films.

JUDGE

R. 209

FILED

ROBERT

IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

THE STATE OF OHIO	:	
Plaintiff	:	CASE NO. 73 CR 098
-vs-	:	
ROBERT SMITH	:	JOURNAL ENTRY
Defendant	:	
	:	

This matter came on to be heard upon the appearance of Otis Hatfield, a witness subpoened in this cause by the State of Ohio, and said Otis Hatfield's failure to bring with him on May 10, 1973, at a prior adversary hearing two motion picture films which were exhibited at the Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court finds that Otis Hatfield was properly served a subpoena duces tecum in this cause on May 8, 1973. That said subpoena duces tecum required the said Otis Hatfield to appear on May 10, 1973 at 2:30 p.m., in this cause, and that said subpoena duces tecum did require Otis Hatfield to produce at the time and place aforesaid two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield had in his possession, control and custody, two motion picture films purportedly entitled "The Wedding" and "Sex and the Working Girl" which were exhibited at the Cinema I Theater

CLERK OF COURTS

May 15, 1973

R. 210

#69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that said Otis Hatfield has appeared at said motion hearing without the said motion picture films and has thereby failed and refused to perform the order of this Court directing that he appear on May 10, 1973, at 2:30 p.m., at a prior adversary hearing conducted in this cause with the two motion picture films which were exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, on May 8, 1973.

The Court further finds that the said Otis Hatfield's failure to produce the films aforementioned, is a disobedience of process issued to him and is thereby a contempt of this Court.

It is therefore ORDERED that the said Otis Hatfield be confined in the County Jail of Allen County, Ohio, for a period not to exceed ten (10) days. It is the further Order of this Court that the said Otis Hatfield can purge himself of such contempt by the production of said motion picture films.

JUDGE

2:21:

IN THE FEDERAL DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
MAY 11 4 50 P.M. '73
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Robert Smith
and
Otis Hatfield

Petitioners

-vs-

Edward Fair, Sheriff of Allen County, Ohio

Respondent

No. C 73-187

ORDER

Upon motion of Petitioners' counsel and for good cause shown,

IT IS HEREBY ORDERED that Petitioners be admitted to bail with surety in the amount of $1,000 as to each petitioner. Bail ACTION STAYED

IT IS FURTHER ORDERED that Respondent herein be immediately notified of this order and a hearing be set immediately to determine the merits herein.

JUDGE

In conformity with Rule 77 (d) F.R.C.P.
Please take notice that a [illegible] of the above
was entered in this cause on MAY 11 1973
Dominic J. Cimino, Clerk

The petition of Robert Smith and Otis Hatfield on behalf of counsel respectfully shows:

1. Petitioners make application herein for a Writ of Habeas Corpus in that they are unlawfully detained and restrained of their liberties by Edward L. Fair and they are now in the custody of the said Edward Fair in the Allen County, Ohio Jail.

2. The Cause or pretext of such detention and restrairt is contempt of court in the Court of Common Pleas of Allen County, Ohio, for failure to comply with subpoena duces tecum (attached hereto is Exhibit A). The said judgment of contempt was entered by the Honorable Robert M. Light, Judge of the Court of Common Pleas of Allen County, Ohio. The Court having imposed a jail sentence of ten days or until petitioners purged themselves by complying with said subpoena duces tecum. The date of imposition of sentence was May 10, 1973. No written journal entry has been docketed as of the date of this petition. Petitioners were represented by Lawrence Sturtz, Esq. Room 1180, 88 East Broad Street , Columbus, Ohio 43215.

3. Said detention and restraint is unlawful in that petitioners' constitutional rights under the 5th and 14th amendment of the Constitution of the United States have been violated in that the State Court failed to recognize petitioners' rights under due process of law and right against self incrimination.

4. Petitioners have no adequate remedy of law in the State of Ohio in that habeas corpus in the State Court will not lie from a jucgment of contempt, said being reviewed only by appeal and the Supreme Court of Ohio has in effect approved the procedures employed against petitioners in direct contravention of their constitutional rights. (See Exhibit B, State of Ohio vs. Robert Boyd, S.C.#73-183, thereby affirming the Allen County Court of Appeals).

5. (A) On May 8, 1973, the State of Ohio, by Lawrence S. Huffman, filed an affidavit alleging that the petitioner , Robert Smith, exhibited obscene material in violation of Ohio Revised Code, Section 2905.35 (See Exhibit C).

(B) On the same date, motion for a prior adversary hearing, with affidavit in support thereof, was filed by Gary R. Hermon, Assistant Prosecuting Attorney, Allen County, Ohio. (See Exhibit D) On the same date a summons was issued notifying the petitioner , Robert Smith,that an affidavit had been filed against him. (See Exhibit E).

On the same date, subpoena duces tecum was issued by the Clerk of Courts directed to Robert Smith, c/o Cinema I Theater, #69 Public Square, Lima, Ohio, (See Exhibit F) and was served upon petitioner Robert Smith and petitioner Otis Hatfield.

On May 10, 1973, the "Prior Adversary hearing" came on to be heard before the Honorable Judge Robert M. Light, at which time the petitioners were declared to be in contempt of Court for failure to comply with the subpoena duces tecum served upon them as heretofore mentioned.

Upon oral motion of counsel, Lawrence Sturtz, for bond, the Court refused the same.

No application for this writ has heretofore been made to any other court of judge.

WHEREFORE, petitioners pray that a Writ of Habeas Corpus be issued to Edward Fair, Sheriff of Allen County, Ohio, commanding him to produce the persons of petitioners before this Court at a time and place set and to show cause if he has any why he so illegally is holding them in restraint of their liberties and in the meantime bail be fixed in accordance with the pleadings herein presented.

verification

certification of service.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT SMITH
and
OTIS HATFIELD

Petitioners

-vs-

EDWARD FAIR, Sheriff
of Allen County, Ohio

Respondent

CASE NO. C73-167
JUDGE NICHOLAS J. WALINSKI

ANSWER

STATE OF OHIO
SS:
ALLEN COUNTY

Edward L. Fair, being first duly sworn, says that he is the Sheriff of Allen County, Ohio; that on May 10, 1973, he placed in custody and under restraint the petitioners, Robert Smith and Otis Hatfield, pursuant to the Order of the Court of Common Pleas of Allen County, Ohio, certified copies of which are attached hereto and incorporated by reference; that the bodies of the said Robert Smith and Otis Hatfield cannot be produced by affiant at the hearing hereof for the reason that the said Robert Smith and Otis Hatfield were ordered admitted to bail on May 11, 1973, in Case No. C73-187 in the United States District Court, Northern District of Ohio, Western Division, entitled Robert Smith and Otis Hatfield, petitioners, vs. Edward Fair, Sheriff of Allen County, Ohio, Respondent, and were thereby released from the custody and restraint at _____p.m., May 11, 1973.

Further affiant saith not.

_____

Sworn to before me and subscribed in my presence, this ____ day of May, 1973.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROBERT SMITH
and
OTIS HATFIELD

Petitioners

-vs-

EDWARD FAIR, Sheriff
of Allen County, Ohio

Respondent

CASE NO. C73-187

JUDGE NICHOLAS J. WALINSKI

MEMORANDUM

FACTS

On May 8, 1973, Robert Smith and Otis Hatfield were each issued an identical subpoena duces tecum (See Exhibit A) requiring that they produce at a prior adversary hearing on May 10, 1973, two motion picture films exhibited at Cinema I Theater, #69 Public Square, Lima, Ohio, and purportedly entitled "The Wedding" and "Sex and the Working Girl".

On May 10, 1973, both failed to bring the films subpoened. During the course of the hearing, the State Court found both to be in contempt of court for their respective disobediences to Court process. (See Exhibits B and C).

ISSUE

Can a defendant and/or witness be compelled to produce at a prior adversary hearing by way of a subpoena duces tecum an allegedly obscene motion picture film?

DISCUSSION

The United States District Court, Northern District of Ohio, Western

Division, has consistently held that before an allegedly obscene motion picture film can be seized, it must first be scrutinized by a magistrate in a prior adversary hearing. This was the ruling by the Court in Boyd v. Huffman, Case No. 70-296, and as recently as April, 1973, in Pursue,Ltd. v. Huffman, Case 72-432.

If, then, an allegedly motion picture film cannot be seized for evidence purposes as an incident to an arrest or pursuant to a search warrant without a prior adversary hearing, by what means did the Court contemplate that such film could be viewed in a prior adversary setting? The Court expressed in correspondence to the Prosecuting Attorney of Allen County, Ohio, Lawrence S. Huffman, the means by which films could be produced. (See Exhibit D). Indeed, when Mr. Huffman issued a subpoena duces tecum for the allegedly obscene motion picture film which was the subject of the aforementioned letter and which resulted in contempt proceedings for such issuance, the Court again approved the use of a subpoena duces tecum to compel production of the file in question. (See Exhibit E).

In addition to the reasons and citations of law given by this Court in Judge Young's opinion attached, there appears to be abundant authority that a subpoena duces tecum is the proper vehicle to require production of an allegedly obscene motion picture film.

Of course, the most obvious logical reason is that the Supreme Court of the United States, when holding that obscenity was outside the scope of First Amendment protection and, generally, laws regulating obscenity were, therefore, constitutional in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, and many later cases, could not have contemplated the creation of unlawful conduct for which there is no constitutional means of enforcement. If law enforcement officials cannot seize

an allegedly obscene film for evidence purposes either as an incident to an arrest or pursuant to search warrant without a prior adversary hearing and cannot constitutionally compel production of such film at such hearing, then obscenity laws regulating exhibition of obscene material, although constitutional, are constitutionally unenforceable.

"The privilege against self-incrimination relates only to a compulsory oral examination, or the equivalent thereof, of an accused person either before or on trial; it does not protect against other forms of examination. It protects him from being required to incriminate himself by speech or the equivalent of speech, such as written statements or confessions or actions which the accused might use in place of words for the purpose of intending to communicate an idea." 21 Am Jur 2d, Criminal Law, Section 354. This construction of the Fifth Amendment has permitted the compulsory taking of blood, handwriting exemplars, voice prints, etc.

In the instant case, the State seeks compulsory production of films, not testimony or incriminating speech. The State seeks production of something tangible, to wit: a film, much like the State could seek production of a handwriting exemplar in a forgery case.

Respondent anticipates that petitioners will attempt to analogize and contend that since an accused cannot be compelled to produce private papers or documents that may contain incriminating evidence citing Boyd v. U.S., 116 U.S. 616, 6 S. Ct. 524, he cannot be compelled to produce films. The distinctions are obvious. First, a man's private papers are often in his own hand and are merely his oral utterances or speech on paper. Second, a man's private papers are just that, private, not voluntarily opened to public scrutiny.

These distinctions were apparent to the Arizona Supreme Court in Anderson v. Coulter, 499 P 2d 103. A copy of the well-reasoned

opinion of Anderson v. Coulter, supra, is attached and marked Exhibit F.

Failure to obey a subpoena duces tecum which required production of allegedly obscene material was recently the subject of a recent United States Supreme Court decision. In Silvers v. Dowling, Case No. 72-871, United States Supreme Court, one Shurgin was issued a subpoena duces tecum for two allegedly obscene films at a hearing scheduled to determine whether an earlier issued injunction enjoining Shurgin from exhibiting obscene material had been violated. Upon advice of his counsel, Silvers, Shurgin refused to obey the order. Upon the representations of Silvers that the two films in question would be made available at a later hearing, the trial court recalled an attachment for Shurgin previously issued by the Court. At the scheduled hearing Silvers announced to the Court that he was unable to produce the films in question. The trial court found Silvers in contempt of court which judgment was eventually appealed to the United States Supreme Court. The U. S. Supreme Court in Silvers v. Dowling, supra, in a per curiam decision dismissed the appeal. A copy of the appellee's brief and announcement of the Supreme Court's dismissal are attached hereto and marked Exhibits G and H, respectively.

In conclusion, respondent respectfully submits that on the basis of earlier decisions of this Court as to the use of a subpoena duces tecum, the well reasoned rationale of Anderson v. Coulter, supra, the historical application of the Fifth Amendment to speech only, and the unreasonable and oppressive result if this Court should, after ordering law enforcement officials to conduct prior adversary hearings, conclude that the only means by which such a hearing could be conducted is violative of petitioners' rights under the Fifth Amendment, petitioners' application

for a Writ of Habeas Corpus should be denied.

Respectfully submitted,

Gary K. Harnish
Assistant Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 540, Lima, Ohio
Telephone: (419) 223-8786
ATTORNEY FOR RESPONDENT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was mailed by regular U. S. Mail this ____ day of May, 1973, to attorney for Petitioners, Ted Iorio, 435 South Hawley Street, Toledo, Ohio.

Appendix AA

Miscellaneous Papers

	Page
Certificate of Incorporation of Pursue Ltd., filed	3-6
Application of Pursue Ltd., for License, dated Nov. 20, 1972	7
Lease and Assignment to Pursue Ltd., dated Nov. 17, 1972	8-18
State Court Docket in 72 CIV 0326	19-22
Federal Docket in 72C384	23
Federal Docket in 72C432	24-25
Federal Docket in 72C445	26
Federal Docket in 73C176	27
Final Decree in *State of Alabama ex rel Sweeton v. First Amendment Foundation Inc. et al*, in the Circuit Court of Madison County Case No. 30846, dated Feb. 23, 1973	28-29
Writ of Injunction in *State of Alabama ex rel Sweeton v. General Corporation et al*, in the Circuit Court of Madison County Case No. 30847, dated Feb. 2, 1973	30-31
Opinion and Order of Federal District Judge Sam C. Pointer Jr. in *General Corp. et al v. Sweeton et al*, in the U. S. District Court Northern District of Alabama, Northeastern Division, filed Mar 8, 1973	32-35
Letter of Chief Judge Brown to Federal Judge Pointer Jr., dated March 19, 1973	36-37

CERTIFICATE OF INCORPORATION

OF

PURSUE, LTD.

1. The name of the corporation is

PURSUE, LTD.

2. The address of its registered office in the State of Delaware is No. 100 West Tenth Street, in the City of Wilmington, County of New Castle. The name of its registered agent at such address is The Corporation Trust Company.

3. The nature of the business or purposes to be conducted or promoted is:

To make investments in the entertainment industry, including, but not limited to record shoppes, theatres and bookstores. To import, export, buy, sell and manufacture films, records and sound recordings of all kinds, books and magazines of all types and descriptions.

To engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

4. The total number of shares of stock which the corporation shall have authority to issue is one hundred (100); all of shch shares shall be without par value.

5A. The name and mailing address of each incorporator is as follows:

NAME	MAILING ADDRESS
S. E. Widdoes	100 West Tenth Street Wilmington, Delaware 19801
W. J. Reif	100 West Tenth Street Wilmington, Delaware 19801
R. A. Finger	100 West Tenth Street Wilmington, Delaware 19801

5B. The name and mailing address of each person, who is to serve as a director until the first annual meeting of the stockholders or until a successor is elected and qualified, is as follows:

NAME	MAILING ADDRESS
Robert E. Smith	2005 100 Colony Square Atlanta, Georgia 30309

6. The corporation is to have perpetual existence.

7. In furtherance and not in limitation of the powers conferred by statute, the Board of directors is expressly authorized:

To make, alter or repeal the by-laws of the corporation.

8. Meetings of stockholders may be held within or without the State of Delaware, as the by-laws may provide. The books of the corporation may be kept (subject to any provision contained in the statutes) outside the State of Delaware at such place or places as may be designated from time to time by the board of directors or in the by-laws of the corporation. Elections of directors need not be by written ballot unless the by-laws of the corporation shall so provide.

9. The corporation reserves the right to amend, alter, change or repeal any provision contained in this certificate of incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon stockholders herein are granted subject to this reservation.

WE, THE UNDERSIGNED, being each of the incorporators named, for the purpose of forming a corporation pursuant to the General Corporation Law of the State of Delaware, do make this certificate, hereby declaring and certifying that this is our act and deed and the facts herein stated are true, and accordingly have hereunto set our hands this 6th day of December 1972.

S. E. Widdoes

W. J. Reif

R. A. Finger

Office of Secretary of State

I, Walton H. Simpson, Secretary of State of the State of Delaware,

do hereby certify that the above and foregoing is a true and correct copy of

Certificate of Incorporation of the "PURSUE, LTD.", as received and filed in

this office the sixth day of December, A.D. 1972, at 10 o'clock A.M.

In Testimony Whereof, I have hereunto set my hand and official seal at Dover this fifteenth day of January in the year of our Lord one thousand nine hundred and seventy-three.

Walter H Simpson

Secretary of State

Asst Secretary of State

FORM 100

THE CITY OF LIMA, OHIO

APPLICATION FOR

Date Applied for November 20, 1972 No.

Theatre License

Issue to Pursue Ltd. Business Address Box 235, Russells Point, O.

Applied for by Robert L. Hollis (Owner) (Agent) Residence Address R.R. #1, Russells Point, O.

Location for which License is desired Cinema I

Nature of License Operate Theatre, under 400 seating capacity

In signing this application, I agree to abide by all Ordinances, Rules and Regulations pertaining to this subject now or hereafter passed by the City Council of Lima, or by any official empowered to issue such regulations.

Fees 60.00 Deposits Signed Robert L. Hollis

Approved

THIS IS NOT A LICENSE

THE CITY OF LIMA, OHIO

APPLICATION FOR

Date Applied for Nov. 20, 1972 No.

Theatre License

Issue to Cinema I Business Address 49 Public Square

Applied for by Pursue Ltd. by Robert L. Hollis (Owner) (Agent) Residence Address R.R. #1, Russells Point, Ohio Box 235

Location for which License is desired

Nature of License Operate Theatre, Transfer Ownership from William Dakota to Robert L. Hollis

In signing this application, I agree to abide by all Ordinances, Rules and Regulations pertaining to this subject now or hereafter passed by the City Council of Lima, or by any official empowered to issue such regulations.

Fees 50 Deposits Signed Robert L. Hollis

Approved

THIS IS NOT A LICENSE

LEASE

THIS LEASE entered into this 1st day of November, 1971, by and between FLORA MARY MOOR, LELAND S. COLLINS, and SARA WALLACE (hereinafter referred to as "Lessor"), and WILLIAM KERN, JR. (hereinafter referred to as "Lessee"), WITNESSETH:

That in consideration of the rents, covenants, and conditions hereinafter set forth, on the part of said Lessee to be paid, performed and observed, said Lessor does hereby demise, let and lease unto said Lessee, the following described premises, situated in the City of Lima, County of Allen, and State of Ohio, to-wit:

That portion of the following described premises now occupied by the theater building formerly known as the Sigra Theater:

Inlot Number one hundred twenty-seven (127) in the original plat of the Town, now CITY, of LIMA, ALLEN COUNTY, OHIO.

Said leased premises are to be used for a theater or for any other lawful purpose.

To have and to hold the same unto said Lessee for the full term of five (5) years beginning on the first day of October, 1971, and terminating on the 30th day of September, 1976, subject to the payment, performance, and observance by said Lessee of each and every, the rents, covenants, and conditions by said Lessee to be paid, performed, and observed, as hereinafter set forth.

Said Lessee does hereby covenant and agree with the said Lessor, their heirs, successors and assigns, as follows, to-wit:

1. That said Lessee will and does hereby accept said premises in the condition they may be at the commencement of the term hereof, subject to all defects therein, whether concealed or otherwise, and whether known or unknown to said Lessor, and to release and forever discharge said Lessor from any and all damages of every kind and nature that may be in any way occasioned

Assignment of Lease
Lima, Ohio November 17, 1972.

For value received, all my right, title, and interest in and to the within Lease and the property therein described is hereby assigned and transferred to Pursue, Ltd., a Delaware corporation, without releasing me of my own personal liability thereon so far as Lessor is concerned.

Pursue, Ltd. hereby accepts the obligations and property rights assigned in the foregoing Lease. Pursue, Ltd. by _____ Pres.

thereby, and at all times to indemnify and save said Lessor, said premises and the improvements thereon harmless from all liens and all liability in any way arising out of the use or condition of said premises or of the improvements thereon.

2. Lessee hereby covenants and agrees to pay as rent to the Lessor, at 60" Savings Building, Lima, Ohio 45801, or such other place as the Lessor may from time to time designate by written notice, an annual rental of Four Thousand Eight Hundred and no/100ths Dollars ($4,800.00), for the first year of the term hereof, and an annual rental of Six Thousand and no/100ths Dollars ($6,000.00) for each successive year of said term, payable in monthly installments of Four Hundred and no/100ths Dollars ($400.00) per month for the first year of the said term by the tenth day of each month, and monthly installments of Five Hundred and no/100ths Dollars ($500.00) for the second, third, fourth, and fifth years of the said term, payable by the tenth day of each month.

3. In addition to the rental hereinbefore provided, the Lessee shall deposit with the Lessor the sum of Two Thousand Four Hundred Dollars ($2,400.00) in cash or other form acceptable to Lessor as security for the payment of rent provided for herein; and for the payment of all other sums of money provided for herein and for the observance and performance by the Lessee of all the terms, provisions, and conditions of this Lease to be performed by the Lessee; and further to indemnify the Lessor for any loss, cost, fees, or expense which the Lessor may incur by reason of any default as aforesaid by the Lessee.

The Lessor shall repay to the Lessee the security deposit or any balance thereof upon the termination or expiration of the term of this Lease or any renewal thereof. In the event of any failure in the payment of rent or other sums or of any default by the Lessee in the performance of the terms, provisions, and conditions of this Lease, the Lessor shall have the right to

apply the security deposit against any loss, cost, fees and expense caused thereby.

Upon receipt of the said sum the Lessor shall deposit the same in The City Loan and Savings Company in an account in the name of the attorneys for the Lessor, Meredith, Meredith, Tait & Basinger. Interest earned during the period of the deposit in accordance with the terms of this provision of the Lease shall be the sole property of the Lessee and shall be paid to him in accordance with the rules of the depository herein provided.

4. Conveyed herewith and by way of security interest to the Lessor all of the chattels owned by Lessee for the purpose of further securing the said Lessor relative to the payment of rentals and compliance with all terms and conditions of this Lease. Such equipment is listed on Exhibit "A" attached hereto and made a part of this Lease as if fully rewritten herein.

5. Lessee will pay all real estate taxes and assessments now and hereafter due and payable during the term of this Lease. Lessee shall pay all personal property taxes and assessments which may be due or payable during the term of this Lease or any renewal thereof, provided, however, that real estate taxes for the year 1971 shall be pro-rated to the date of October 1, 1971, between the Lessor and the Lessee.

6. Lessor shall keep said premises fully insured with comprehensive fire insurance for its full insurable value. Lessee shall be responsible for the insuring of all equipment located in or about the premises and shall purchase and pay for public liability insurance in the sum of not less than $100,000/$300,000 in coverage which shall be in the name of the Lessee and the Lessor.

7. Lessee shall pay for all electricity, gas, water, heat, and other utilities which shall or may be assessed and charged against the premises during the term of said Lease.

8. That said Lessee will make all repairs in the interior of the premises hereby leased and will indemnify and save harmless said Lessor from and against all liens, claims, and damages by reason of any repairs or improvements which may be made by said Lessee on said premises, except repairs to the roof, sidewalks, and exterior of the building, which shall be made by and at the expense of said Lessor, upon reasonable notice given by Lessee of the necessity therefor.

9. That said Lessee will at all times keep the sidewalks along said premises free and clear of obstructions to travel thereon, and of snow and ice.

10. That said Lessee will use and keep said premises in a careful, safe, and proper manner, and will carefully conduct and guard all fires that may be conducted thereon.

11. That said Lessee will not commit or suffer any waste thereon.

12. That said Lessee will keep said premises, and all parts thereof, and all fixtures, machinery, and apparatus, in good repair and in such condition that no damage will occur to any person by reason thereof.

13. That said Lessee will fully comply with and obey all laws, ordinances, rules, regulations, and requirements of all regularly constituted authorities, in any way affecting said premises or the use thereof, or this Lease.

14. That said Lessee will not use or occupy said premises for any unlawful purpose, and provided, further, that the conviction of the Lessee or any agent or employee of his in connection with the use or occupancy of this building for any crime or misdemeanor committed under the laws of the State of Ohio, or the Ordinances of the City of Lima, Ohio, shall void this Lease when such conviction shall become final and shall work an immediate forfeiture thereof in favor of the Lessor, at the Lessor's option.

15. That said Lessee will make no change in the construction of the building on said premises, without the written consent of the Lessor.

16. That said Lessee will permit said Lessor and the agents of said Lessor to enter upon said premises at all reasonable times, to examine the condition thereof, or make such repairs, additions, or alterations therein as may be necessary for the safety, preservation, or improvement thereof, or of said building, or to exhibit the same.

17. Lessee will replace all window glass or plate glass installed in any of said buildings at his own expense.

18. That said Lessor shall not be liable for any loss or damage occasioned by any defect in said premises, or by defective wiring, plumbing, gas, water, steam, hot water, or other pipes, or from sewage, or by the bursting, leaking, or running of any cistern, tank, boiler, washstand, closet, or wastepipe, or by water, snow, or ice upon the roof, skylight, trap door, or otherwise, or by the acts or negligence of co-tenants, or other occupants of said building, or of the owner or occupant of adjacent, contiguous property.

19. Lessee shall at all times keep the sanitary and drainage system in good repair and condition.

20. Lessee will keep said premises in such repair and condition as may be required by the Board of Health, or other city, state, or federal authorities, free of all cost to said Lessor.

21. Lessee shall and will save Lessor harmless from any and all claims and demands of every kind and nature, in favor of any person, whether by way of damages or otherwise, arising from the failure on the part of the Lessee to perform and observe any covenant or condition thereof.

22. That no waiver, on the part of said Lessor, their heirs, successors or assigns, of any default or breach by said Lessee of any covenant, agreement, and condition of this Lease on

their part to be kept and performed, shall be construed to be a waiver of the rights of said Lessor as to any future default or breach by said Lessee of any of the covenants, agreements, and conditions of this Lease on his part to be performed.

23. That said Lessee will surrender and deliver up said premises and all appurtenances thereto excepting those items set forth on Schedule A hereof and all chattels and equipment, whether herein demised or placed upon the said premises or used by the Lessee in connection with the operation of said theater, at the end of the term in as good order and condition as the same now are or may be put by said Lessor, reasonable use and natural wear and tear or unavoidable casualty excepted. Provided, however, that if said rent, or any part thereof, shall at any time be in arrear and unpaid, with or without any demand being made therefor, or if said Lessee shall fail to keep and perform and observe any of the covenants, agreements, or conditions of this Lease on the part of said Lessee to be kept, performed, and observed, or if said Lessee shall be adjudged a bankrupt, or shall make an assignment for creditors, or if the interest of the Lessee herein shall be sold under execution, or other legal process, it shall be lawful for said Lessor, their heirs, successors and assigns, to enter into said premises and again have, repossess, and enjoy the same, as if this Lease had not been made, and thereupon this Lease, and everything herein contained, on the part of said Lessor to be done and performed, shall cease, terminate, and be utterly void, without prejudice, however, to the right of the Lessor to recover from said Lessee all rent due up to the time of such entry. In case of such default and entry by said Lessor, said Lessor may relet said premises for the remainder of said term for the highest rent obtainable, and may recover from said Lessee any deficiency between the amount obtained and the amount hereinbefore reserved.

24. Should said Lessee, with or without the express or implied consent of said Lessor, continue to hold and occupy said

premises after the expiration of the term of this Lease, such holding over beyond the term and the acceptance or collection of rent by Lessor, shall operate and be construed as creating a tenancy from month to month, and not for any other term whatsoever, but the same may be terminated by said Lessor by giving said Lessee thirty (30) days written notice thereof, and at any time thereafter said Lessor may re-enter and take possession of the said premises, any rule in law or equity to the contrary notwithstanding.

25. In case the premises hereby leased shall be partially damaged by fire but not rendered untenantable, the same shall be repaired with all proper speed at the expense of the Lessor, but if the damage shall be so extensive that said premises are rendered unfit for occupancy by said Lessee, then in that event Lessor shall have the option of repairing said damage to said premises, if said damage can be repaired within a period of one hundred twenty (120) days from the occurrence of said damage and thereafter continue this Lease. It is expressly agreed between Lessor and Lessee that in the latter case, if said Lessor shall elect to repair said premises, then the rent herein reserved shall cease from the time of the occurrence of said damage, and shall be again payable from the date when such repairs shall be completed within said time as herein set forth. And said Lessor, for themselves, their heirs, successors, and assigns, hereby covenants and agrees with said Lessee, his heirs, successors and assigns, that said Lessee paying rents and performing and observing each and every covenant and condition hereof on the part of said Lessee to be performed and observed, said Lessee shall peaceably and quietly hold, occupy, and enjoy said premises during the term, without any let, hindrance, or molestation by any person whatsoever.

26. Lessee has been made aware of the status of existing ground leases relative to the said theater building now the

subject of litigation in the Court of Common Pleas of Allen County, Ohio, and while it is not anticipated that such litigation or the involvement in regard thereto could in any way affect the occupancy of the said building, it is understood by Lessee that such involvement resulting from the eventual adjudication of a superior right of any other person in regard to the cause now pending shall result in a termination of the Lease as if by mutual agreement of the parties.

27. Lessee is hereby granted an option to renew this Lease for an additional term of five (5) years on the same terms and conditions as during the original term except as to rentals, duration of the term, and further rights of renewal; provided, however, that Lessee shall notify Lessor not less than six (6) months prior to the commencement of any such renewal term of his intention to renew such option, provided, further, that Lessee has at all times prior hereto fully complied with the terms and conditions hereof and that this Lease is then in full force and effect. The rental to be paid in the event of a renewal shall be negotiated by the parties and shall in no case exceed a gross increase in the amount of fifty percent (50%) of the rental provided for herein.

28. Forest Moor, Serelda Collins, and William P. Wallace, the husbands and wife of the Lessors herein, do by the affixing of their signatures hereon, hereby waive all rights of dower which they might have in the said premises.

IN WITNESS WHEREOF, the said Lessor and Lessee have hereunto set their hands to duplicates hereof, on the day and year first above written.

Signed and acknowledged in
the presence of:

Flora Mary Moor

Forest Moor

Leland S. Collins

Loreida Collins

Sara Wallace

William P. Wallace

"LESSOR"

Malcolm D. Basinger

William Kern, Jr.

"LESSEE"

STATE OF OHIO)
)SS:
COUNTY OF ALLEN)

Before me, a Notary Public in and for said coun. personally appeared the above named Flora Mary Moor and Forest Moor, who acknowledged that they did sign the foregoing ...r and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set m. ha official seal at Lima, Ohio, this 22nd day of ..., ...

Notary Public, Allen County, Ohio

THE STATE OF Florida)
) SS:
COUNTY OF Lake)

Before me, a Notary Public in and for said coun personally appeared the above named Leland S. Collins and Lore.. Collins, who acknowledged that ... did sign ... ...going ... ment and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand a official seal at Clermont, Florida, th.. 18t. ... March, 1972.

Notary Public, ... County, ...

NOTARY PUBLIC STATE OF FLORIDA AT ...
MY COMMISSION EXPIRES ... 24, 19...
...

THE STATE OF FLORIDA)
) SS:
COUNTY OF PINELLAS)

Before me, a Notary Public in and for said county personally appeared the above named Sara Wallace and William P. Wallace, who acknowledged that they did sign the foregoing instrument and that the same is their free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at St. Petersburg, Florida, this 7th day of March, 1972.

Mary Leanne Gibson
Notary Public, Pinellas County, Florida

Notary Public, State of Florida at Large
My Commission Expires FEBRUARY 24, 1973

THE STATE OF OHIO)
) SS:
COUNTY OF ALLEN)

Before me, a Notary Public in and for said county personally appeared the above named William Kern, Jr. who acknowledged that he did sign the foregoing instrument and that the same is his free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Lima, Ohio, this 24th day of February, 1972.

Malcolm D. Basinger
Notary Public, Allen County, Ohio

THIS INSTRUMENT PREPARED BY:

Malcolm D. Basinger
Attorney at Law
607 Savings Building
Lima, Ohio 45801

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WAS ITSELF UNREADABLE.

All chattel property located in and about the Debtor's address and including, but not limited to the following:

315 theater seats

Two (2) Super Simplex 35mm motion picture projectors

Complete sound system as installed

Screen as installed

All property being used in and about a theater business conducted at 69 Public Square, Lima, Allen County, Ohio.

"EXHIBIT A"

APPEARANCE AND EXECUTION Docket CIVIL—2 72CV0326

State of Ohio, ex rel. Lawrence B. Hoffman 127-129 North Pierce Street Lima, Ohio --vs- Plaintiff William B. Dakota 2650 West Market Street Lima, Ohio Flora May Collins Snow 104 South Dale Drive		Lawrence B. Hoffman Gary Bertram	Injunction Judge Light
Date Issued	Name and Address of Defendants	Plaintiffs Filed Costs Unless Costs Endorsed and Copies of Return	
Lima, Ohio Leland Samuel Collins Address Unknown Zara Lee Collins Address Unknown Pussy Cat Corporation # 69 Public Square Lima, Ohio or Los Angeles, California Cinema I. Theatre # 69 Public Square Lima, Ohio John Doe # 1(John Brownell) c/o Cinema I # 69 Public Square Lima, Ohio John Doe # 2(Robert Smith, a/k/a Slason) c/o Cinema I # 69 Public Square Lima, Ohio	John Doe # 3 (Allen B. Brown) c/o Cinema I # 69 Public Square Lima, Ohio John Doe # 4 c/o Cinema I # 69 Public Square Lima, Ohio John Doe # 5 c/o Cinema I # 69 Public Square Lima, Ohio Jane Doe # 1 (Geraldine Scott) c/o Cinema I # 69 Public Square Lima, Ohio Jane Doe # 2 c/o Cinema I # 69 Public Square Lima, Ohio	William C. Russell, Indiv. and as Guardian of Bruce L. Blair and Corrine K. Russell 2722 213rd Street Torrance, California 90505 Edward L. Russell 17 LaVuesta Drive San Rafael, California 94901 Michael F. Russell 17 LaVuesta Drive San Rafael, California 94901 Patricia L. Fitzgerald 1701 Divisadero, Apt. No. 107 San Francisco, California Irene C. Russell 636-C Calle Tadio Laguna Hills, California 92653 Party-Defendants	

1972 Sept. 15 1 Complaint filed.
" 15 2 Motion for temporary injunction filed.
" 15 3 Notice of hearing filed.
" 15 4 Request for Personal Service filed.
" 18 Subpena issued.
" 18 Summons together with copy of complaint,motion and notice issued to the Sheriff of Allen County, Ohio,for personal service upon William B. Dakota,2650 West Market St., Lima, Ohio; and Cinema I. Theatre,by serving William B. Dakota,its manager,# 69 Public Square, Lima, Ohio.

" 18 Summons together with copy of complaint,motion,notice issued to the Sheriff of Allen County, Ohio,for personal service upon Flora May Collins, Snow, 104 S. Dale Dr., Lima, Ohio; and John Doe # 1,John Doe # 2,John Doe # 3,John Doe # 4.

" 20 5 Amended Complaint filed.
" 20 6 Affidavit for service by publication filed.
" 20 7 Request for service filed.
" 20 Summons together with copy of complaint,motion,notice and amended complaint mailed by certified mail;return receipt requested to the defendants, Ethel Leland Samuel Collins, 510 River St. P.O. # 2,Marion, Ohio 44302; and Zara Lee Collins (Miller) 1330 Montecello Blvd.,North,St. Petersburg, Florida 33703. Postage ($3.75+$1.46).

" 20 Subpena issued.
" 21 8 Summons Returned: I received this summons on September 19,1972, at 8:00 o'clock P.M.,and personal service of it upon William B. Dakota & Cinema I. Theatre,by serving William B. Dakota, the manager thereof., by leaving them and tendering a copy of summons and accompanying documents, thereto and the petition,motion for temporary injunction and notice of hearing on September 20,1972. Edward L. Fair, Sheriff. By Charles Harrod,Deputy. Fees --

" 21 9 Summons Returned: Sheriff's Returns received this summons on September 18,1972, at 2:00 o'clock P.M.,and made personal service of it upon Flora May Collins Snow, John Doe # 1, namely, John Brownell, John Doe # 2,namely Robert Smith a/k/a Slason, John Doe # 3,namely, Allen B. Brown, Jane Doe #1,namely Geraldine Scott,by locating

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72 CIV 926

APPEARANCE AND EXECUTION Docket CIVIL—2 (Page 2)

NAMES OF PARTIES TO SUIT	ATTORNEYS	ACTION
The State of Ohio, ex rel. Lawrence S. Huffman -vs- William H. Dakota,et al.	Gary H. Bauman	Injunction

DATE			PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN
			1972
			then and tendering a copy of summons and accompanying documents, including the petition,motion for temporary injunction,and notice of hearing on September 18, 1972. Edward L. Fair, Sheriff. By J.E. Carlock,Deputy.
Sept.	20	10	Subpoena issued.
"	22	11	Motion filed.
"	25	12	Return Receipt,signed, Mara Wallace filed.
"	25	13	Return Receipt,signed, Leland S. Collins filed.
"	25	14	Memorandum contra motion of Defendant, Flora May Moor to Join His Defendants filed.
"	25	15	Proof of service of amended complaint filed.
"	25	16	Proof of service of amended complaint filed.
"	26	17	Motion to Quash Subpoena Duces Tecum with Memorandum Attached Filed.
"	26	18	Motion to dismiss filed.
"	26		Subpoena issued
"	26		Subpoena Duces Tecum issued
Oct.	2	19	Judgment Entry joining party defendants filed.
"	3		Summons together with copy of complaint,motion and amended complaint mailed by certified mail;return receipt requested to the Party-Defendants, William H. Russell, Indio, and as guardian of Grace E. and Corrine E. Russell,2702 Union St.,Torrance, Calif.; Edward L. Russell,17 LaPuesta Dr.,San Rafael, Calif.; Michael E. Russell, 17 LaPuesta Dr.,San Rafael, Calif.; Patricia L. Fitzgerald,3701 Divisadero, Apt. 407, San Francisco, Calif.; Irene C. Russell, 6442 Calle Cadiz, Laguna Hills, Calif. Postage ($1.05+$.24).
"	10	20	Return Receipt,signed, Edward L. Russell filed.
"	10	21	Return Receipt,signed, Irene C. Russell filed.
"	10	22	Return Receipt,signed, Michael E. Russell filed.
"	10	23	Return Receipt,signed, William C. Russell filed.
"	13	24	Supplemental Memoranda Filed.
"	16	25	Summons mailed to Patricia L. Fitzgerald,returned, refused filed.
"	16		Summons mailed by regular mail to the ...ef Grant, Patricia L. Fitzgerald, 3701 Divisadero, Apt. 407, San Francisco, California. Postage ($.40).
"	19	26	Answer filed.
"	24	27	Order filed.
"	25	28	Motion to stay judgment pending appeal filed.
"	30	29	Return on Inventory filed.
"	30	30	Approval of Return of Inventory filed
"	31	31	Answer of Defendants, Walter T. Russell,William C. Russel as guardian of Grace E. Russell and Corrine E. Russell,Edward L. Russell,Michael E. Russell,Patricia L. Fitzgerald,and Irene C. Russell filed.
Nov.	3	32	Motion filed.
"	3	33	Journal Entry filed.
"	3		Subpoena issued.
"	3	35	Request filed.
"	6		Certified copy of Journal Entry mailed by certified mail, return receipt requested to Leland Samuel Collins 410 River Street S. E. # 2 Madison, Ohio 44057 and Mara Lee Collins (Wallace) 1508 Monticello Boulevard, S 9th Saint Petersburg, Flor.da. 33707. Postage $1.46
"	6	36	Journal Entry granting leave to file answer filed.
"	6	37	Answer filed.
"	6	38	Proof of Publication filed. The Lima News $216.72
"	6	39	Motion filed.
"	6	40	Journal Entry on Motion filed.
"	9	41	Return Receipt filed. Signed from Leland Samuel Collins
"	13	42	Return Receipt,signed, William F. Wallace filed.
"	20	43	Journal Entry overruling motion filed.
"	30	44	Journal Entry filed.
Dec.	1		Subpoena issued.
"	4	45	Writing filed.
"	7	46	[illegible]

APPEARANCE AND EXECUTION Docket No. CIV-2 72 CIV 926 (Page 3)

NAMES OF PARTIES TO SUIT	ATTORNEYS	ACTION
The State of Ohio, ex rel. Lawrence S. Huffman -vs- William H. Dakota,et al.		

DATE			PLEADINGS FILED. WRITS ISSUED. WRITS RETURNED AND COPIES OF RETURN
			Allen County, Ohio,to personally handing to them a copy of said Journal Entry to the Below de; Pied individuals on No ember 22,1972 to John Powell,1[illegible] Lima, Ohio; Robert Smith,405 [illegible] North,Lima, Ohio; and Gerri ine Scott,40 East [illegible]Lima, Ohio. Edward L. Fair, Sheriff. By Russell L. Bradford, Deputy.
Dec.	7	47	The undersigned does hereby certify that on November 22,197[illegible], a certified copy of the foregoing Order was personally served upon the following persons located at the Cinema I Theatre, 110 Public Square,Lima, Ohio, upon Robert Hollis. Edward L. Fair Sheriff. By [illegible] L. Bradford, Deputy.
"	7	48	Return: The undersigned does hereby certify that on November 21,197[illegible], a certified copy of the foregoing Order was personally serving upon the following persons located at the Cinema I Theatre, 110 Public Square,Lima, Ohio, upon Marvin Hart, 220 W. Jameson,Lima, Ohio, Richard Powell,1[illegible] Fred St.,Lima, Ohio, Robert Smith, 436 East North Street,Lima, Ohio. Edward L. Fair, Sheriff. By J. E. Carlock,Deputy.
"	8	49	Motion filed.
"	8	50	Subpoena filed.
"	11	51	Memorandum of law on effect of removal on state Court action filed.
"	11	52	Notice of Removal filed.
"	27	53	[illegible]
"	29	54	Memorandum in Support of motion filed.
1973 May	9	55	Motion filed.
"	1	56	Journal Entry setting time of hearing filed.
"	3	57	Petition for removal filed.
"	3	58	Memorandum of Law on effect of removal on State Court Action filed.

STATE OF OHIO } ss CERTIFICATE OF C[illegible]
Allen County } ROBERT H. DUNLAP Clerk of the Court of Com[illegible]
[illegible] and for said County, do hereby certify that the [illegible]
[illegible] and foregoing is a true and correct copy of [illegible]
[illegible] as the same remains of record in my office.
In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at Lima, in said County, this [illegible] day of [illegible] A.D. 19[illegible]
SEAL ROBERT H. DUNLAP, Clerk
By [illegible] Deputy

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No. 72 CIV 0356 P. Rec. P. Ex. Docket CIVIL—2 Term, A.D. 19

Statement of Costs Sent — Fee Book No. ____ Page 1

TITLE OF CASE

State of Ohio, ex rel. Lawrence S. Huffman
-vs-
William H. Dakota, et al.

DATE	DEPOSITED BY	AMOUNT	C.B. No.	PAGE

COSTS	PLFF	DEFT	RECEIPT FOR FEES
Robert H. Dunlap, Clerk Fee Fund			
Edward L. Fair, Sheriff			
Execution, Fee Fund			
Witnesses, see below			
Official Stenographer			
Transcript			
Foreign Sheriff			
" "			
" "			
Printer			
"			
"			
Justice			
"			
Constable			
"			
Clerk's Release			
Guardian ad Litem			
Depositions			
"			
Appraisers			
"			
"			
"			
"			
"			
Witnesses			

FINDINGS, JUDGMENTS, ORDERS AND DECREES

Oct. 27, 1972. Upon considerat on, defendant motion to stay judgment pending appeal is overruled. Hearing on permanent injunction assigned for November 7, 1972 at 9:00 o'clock A.M. Mr. Huffman to prepare the entry, Robert M. Light Judge.

C. B. No. ____ Page ____ SATISFACTION

647 3 | Docket Vol. 72 No. 0304 | Filing Date 10 26 72 | 3 44 1 | Demand $ Inj. | 4714 | Docket Vol. 72 No. 384

DAKOTA, William

FAIR, Edward, Sheriff
GARLOCK, Joe, Deputy Sheriff

- ATTORNEYS -

Tod Iorio
435 S. Hawley St.
Toledo, Ohio 43609

Lawrence J. Huffman
Prosecuting Attorney, Allen County
Lima, Ohio

- CAUSE -

10/26/72 Civil cover sheet filed.
10/26/72 Complaint filed.
10/26/72 Motion for temporary restraining order filed.
10/26/72 Memo. in support of motions for temporary restraining order and preliminary injunction filed.
10/26/72 Certification of notice to Lawrence Huffman re request for temporary restraining order filed.
10/26/72 Motion for preliminary injunction filed.
10/26/72 Motion to convene a three judge panel filed.
10/26/72 Summons issued. Two copies summons and two copies of all pleadings filed to U. S. Marshal.
10/30/72 Minutes of proceedings filed. NJW. Hearing on motion for temporary restraining order: stip. of counsel re admissions and denials of parts of complaint: arguments of counsel. Matter taken under advisement.
11/2/72 Opinion and Order filed. NJW. State injunction stayed only so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing. Copy 77(d) to Iorio and Huffman.
12/4/72 2 Summons returned, executed and filed. Both Defts. served 10/27/72 by cert. mail Fees $8.00

Nicholas J. Walinski | Fees Paid 71752 17 | NOV 2 1972

UNITED STATES DISTRICT COURT DOCKET
CERTIFIED COPY

Northern District of Ohio
Western Division

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647	3	DOCKET 72	0432	FILING DATE 12 01 72	3 44	1	DEMAND	4714	DOCKET 72 432

PLAINTIFFS

PURSUE, Ltd.

Ted Iorio
435 S.Hawley St.
Toledo, O. 436-9 (248-5351)

Gilbert H. Deitch,Esq.
Suite 2005, 1175 Peachtree St.,N.E.
Atlanta, Ga. 30309

Robert E. Smith
Suite 507, 102 W. Pennsylvania Ave.
Towson, Maryland 21204

DEFENDANTS

HUFFMAN, LAWRENCE S. in his capacity as Prosecutor Allen County

FAIR, EDWARD, in capacity as Sheriff Allen County, Ohio

Lawrence S. Huffman, Prosecuting Attorney
Allen County, 127-129 N. Pierce St.
Lima, O. 45802 (229-0786)

12/1/72	Civil cover sheet filed.
12/1/72	Complaint for T.R.O., Preliminary and permanent injunction, etc. filed.
12/1/72	Order granting stay of judgment entry of the Allen Co. Common Pleas Court, # 72 CIV 0326 dated 11/30/72 except insofar as any order which may apply to films previously declared obscent in prior hearing filed. NJW. Two true copies to U. S. Marshal. True copy mailed with complaint to Governor John Gilligan and Hon. William Brown, Iorio, Deitch, & Saith
12/1/72	Summons issued. Two copies summons, 2 copies complaint and 2 copies order granting stay to U.S. Marshal.
12/11/72	Designation of three judges by Sixth Circuit Court of Appeals, Judge Walinski, Judge Young and Judge Celebrezze filed.
12/21/72	Order for parties to file briefs in support of their respective positions on or before 1/15/73 filed. NJW. Copy 77(d) mailed to: Smith, Deitch, Huffman and Fair.
12/31/72	Complete pleadings and papers to date prepared and given to Judge Walinski, Judge Young and Judge Celebrezze.
2/22/72	2 Summons returned, Executed & filed. Huffman served 12/5/72; Fair served 12/5/72. Fees $14.00.
12/27/72	Stip. and order that pltfs. may file amended complaint instanter and defts. may plead or move within 14 days from date of the filing of the amended complaint. NJW. Notice waived. (Copies to Judge Walinski, Judge Young and Judge Celebrezze.)
2-29-72	Pltf. Amendments to Complaint, filed. Copy mailed 12-26-72. (Orig..4 copie (Copies to Judges Walinski, Young & Celebrezze on 1/4/73)
1/5/73	Deft's. answer to complaint and amendments to complaint filed. Mailed 1/4/73. (Copy to Judge Walinski, Young & Celebrezze on 1/8/73)
1/16/73	Trial brief of defendant filed. Copy mailed 1/15/73. Copy to Judge Celebreeze, Judge Young and Judge Walinski.

Nicholas J. Walinski

71982 23 JAN 2 1973

UNITED STATES DISTRICT COURT DOCKET

CERTIFIED COPY

UNITED STATES DISTRICT COURT FOR
Northern District of Ohio
Western Division

1/18/73	Recitation of points and authorities in support of contentions before the Court by plaintiff filed. Mailed 1/17/73. Copy mailed to: Judge Celebreezze, Young and Walinski.
2/12/73	Motions to dissolve temporary restraining order and to dismiss filed. Mailed 2/9/73. 2/20/73 - Copy to Judge Young, Walinski and Celebreeze.
2/12/73	Motion for immediate hearing on motions to dissolve T.R.O. and to Dismiss filed. Mailed 2/9/73. Copies mailed to Judge Walinski, Young and Celbbreeze on 2/20/73.
2/12/73	Proposed order re: motions to dissolve T.R.O. and to Dismiss LODGED.
3/5/73	Ordered Cause set for pretrial 3/7/73 at 10:00 AM; Hearing set 3/12/73 at 10:30 AM filed. DJY. Copies 77(d) by special delivery to Deitch, Smith, Huffman, Ioris and Judge, Celebrezze
3/12/73	Supplemental Memorandum of Defts. filed.
3/12/73	Minutes of Proceedings filed. NJW. Hearing on motion to dissolve Temporary Restraining Order. Arguments of counsel; matter taken under advisement.
4/20/73	Opinion and Order filed. AJC. DJY. NJW. Defts enjoined from executing portion of Allen County Common Pleas Court's judgment of Nov. 30, 1972 which orders closing of Pltfs theater pursuant to O.R.C. §3767.03; three judge court dissolved and case remanded to NJW for further proceedings under Pltf. claim for damages. Copies 77(d) to Deitch, Smith, Huffman, Iorio and Judge Celcebrzze.

647 3 | Docket Yr. 72 Number 0145 | Filing Date Mo. 12 Day 11 Yr. 72 | 4 44 2 | Demand Inj. | 4714 | Docket Yr. 72 Number 445

DEFENDANTS

HUFFMAN, Lawrence S.
(State of Ohio, ex rel)

DAKOTA, William H. a/k/a Jack Desmond a/k/a William Kern

MOOR, Flora May Collins

COLLINS, Leland Samuel

Defendants cont'd.

ATTORNEYS

Lawrence S.Huffman
Prosecuting Attorney
Allen County
Lima, O. 45802

Ted Iorio - 435 S. Hawley St.
Toledo, O. 43609 - (241-3268)

Gilbert Deitch

CAUSE

12/11/72	Civil cover sheet filed.
12/11/72	Petition for removal filed.
12/11/72	Notice of removal filed.
12/11/72	$250.00 deposited in Registry as surety for costs.
12/18/72	Motion to remand filed. Mailed 12/15/72.
12/18/72	Memo. in support of motion to remand filed. Mailed 12/15/72.
12/18/72	Motion for immediate hearing filed. Mailed 12/15/72.
2/12/73	Motion for immediate hearing on motion to remand filed. Mailed 2/9/73.
2/12/73	Proposed order re: hearing on motion for immediate hearing on remand LODGED.
3/12/73	Additional Memorandum of Pltf. in Support of Motion to Remand filed.
1/26/73	Opinion and Order filed. MJW. Cause be and hereby is dismissed. Copies 77(d) to Huffman, Iorio and Deitch.

Nicholas J. Walinski

FEES D.C. 74666 23 JAN 2 1973 MAY 2 1973

ITED STATES DISTRICT COURT DOCKET

TIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR Northern District of Ohio Western Division

647 3 | Docket Yr. 73 Number 0176 | Filing Date Mo. 05 Day 03 Yr. 73 | 3 44 2 | Demand | 4711 | Docket Yr. 73 Number 176

DEFENDANTS

Huffman, Lawrence S.
(State of Ohio ex rel)

Dakota, William H.
Moor, Flora May Collins
Collins, Leland Samuel
Collins, Sara Lee
Pussy Cat Corp. - Lima
Pussy Cat Corp. - L.A. Calf.
Cinema I. Theatre
Doe, John #1, 2, 3, 4, 5.
Doe, Jane #1, 2.

ATTORNEYS

Lawrence S. Huffman, Esq.
Prosecuting Attorney
Allen County, Ohio
Assistant Attorney General
Room 210 71 E. State St.
Columbus, Ohio 43215

Ted Iorio, Esq.
435 South Hawley St.
Toledo, Ohio 43609
Ph.No. 248-5351

Gilbert H. Deitch, Esq.
Suite 2005 100 Colony
1175 Peachtree St. N.E.
Atlanta, Georgia 303
Ph. 892-8690 (404)

CAUSE

Petition for removal - Civil Rights.

5-3-73	Civil Covdr Sheet, filed.
5-3-73	Notice of removal, filed.
5-3-73	Petition for Removal, filed. Copies served.
5-3-73	Memo. of Law on Effect of Removal on State Court Action, filed.
5-3-73	Bond in sum of $250.00 with The Travelers Indemnity Co. as surety, filed.

Don J. Young, Judge

FEES D.C. 74774

NITED STATES DISTRICT COURT DOCKET

RTIFIED COPY _____ DATE

UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF OHIO/ W.D.

STATE OF ALABAMA IN THE CIRCUIT COURT, IN EQUITY

COUNTY OF MADISON CASE NO. 30643

STATE OF ALABAMA on the relation of EUGENE SMELLEY, Chief of Police of the City of Huntsville, Alabama PETITIONER

Vs.

FIRST AMENDMENT FOUNDATION, INC., a corp. organized and existing under the laws of the State of Louisiana, CHARLES L. MUSICK, JR.; CARLTON L. PITTMAN; RICHARD ROE; ABC CORP.; XYZ CORP; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3; and JOHN DOE #4 RESPONDENTS

FINAL DECREE

This cause being submitted for final decree on the Pre-Trial ORders of February 13 and February 22, 1973, the pleadings, stipulations and the evidence, the Court finds as follows:

1. The respondent, First Amendment Foundation, Inc., a Louisiana Corporation operates the theater called "Cinema Royal" located at 1022 North Memorial Parkway, Huntsville, Alabama and that Charles L. Musick, Jr. and Carlton L. Pittman are President and Vice-president of First Amendment Foundation, Inc. Kenneth Selberg is manager of said theater.

2. The evidence shows the respondents have shown obscene movies as defined by Title 14 § 374(16j) et. seq., Code of Alabama 1940 (Recomp. 1958), by Roth v. U.S. 354 U.S. 476, 1 L Ed. 2d 1498, 77 S. Ct. 1304 or by any other standard that this Court is aware. "Obscene" means lewd, Title 14 § 374 (3) Code of Alabama 1940 (Recomp. 1958). "Lewd" means "obscene" Black's Law Dictionary 4th Ed. p. 1052.

3. Title 7 § 1091 Code of Alabama 1940 (Recomp. 1958) provides that a place where lewdness is conducted, permitted, continued or exists shall constitute a nuisance.

4. The Court finds the respondents have operated their theater so as to constitute a public nuisance under the laws of that State. No intent was shown by the respondents to operate their place of business other than as a public nuisance nor that they had ever operated said theaters in any other manner.

5. That the respondents contentions as outlined in the Pre-Trial Order of February 13, 1973 are not sufficient to deny the relief sought by the petitioner.

It is therefore CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court:

1. That the respondents are perpetually enjoined from maintaining a nuisance at 1022 North Memorial Parkway, Huntsville, Alabama or elsewhere in the county.

2. That all personal property and contents used in conducting the nuisance shall be removed from 1022 North Parkway, Huntsville, Alabama, and this personal property shall be sold in the manner provided for the sale of chattels under execution.

3. That the theater, Cinema Royal, located at 1022 North Memorial Parkway shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 § 1104 Code of Alabama 1940 (Recomp. 1958).

4. That the proceeds of the sale of personal property shall be applied in payment of costs of action and abatement and petitioner's costs.

5. Petitioner is denied attorney's fees and the accounting."

This the 23rd day of February, 1973.

JOHN D. SNODGRASS
Circuit Judge

STATE OF ALABAMA — IN THE CIRCUIT COURT, IN EQUITY

COUNTY OF MADISON — CASE NO. 30847

STATE OF ALABAMA on the relation of EUGENE SWEETON, Chief of Police of the City of Huntsville, Alabama — PETITIONER

Vs.

GENERAL CORPORATION, CHARLES E. OUTLAND, FLOYD C. DAVIDSON, JEAN PHILLIPS, et al — RESPONDENTS

WRIT OF INJUNCTION

Whereas, the State of Alabama on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama, Petitioner, has exhibited its bill of complaint in equity in the Circuit Court of Madison County, and has obtained from the Honorable John D. Snodgrass, Circuit Judge, an order for the issuance of an injunction, and other relief, to enjoin you as hereinafter mentioned; and whereas, in said cause it has been ordered, adjudged, and decreed by the court as follows:

"1. That the respondents are perpetually enjoined from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama or elsewhere in the county.

2. That all personal property and contents used in conducting the nuisance shall be removed from 205 East Side Square, Huntsville, Alabama, and this personal property shall be sold in the manner provided for the sale of chattels under execution.

3. That the theater, Fox Cinema, located at 205 East Side Square, Huntsville, Alabama shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 S 1104 Code of Alabama 1940 (Recomp. 1958).

4. That the proceeds of the sale of the personal property shall be applied in payment of costs of action and abatement and petitioner's costs.

5. Petitioner is denied attorney's fees and the accounting."

Now, therefore, you, the said General Corporation and Jean Phillips are hereby enjoined from maintaing a nuisance at 205 East Side Square, Huntsville, Alabama or elsewhere in the

county, and the theater, Fox Cinema, located at 205 East Side Square, Huntsville, Alabama shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 S 1104, Code of Alabama 1940 (Recomp. 1958), and this injunction you are required to obey under the penalties of law, until the further order of this Court.

Witness my hand, this_____day of February, 1973.

_____
Register.

To the Sheriff of Madison County:

You are hereby commanded to execute this writ, and return the same with your endorsement thereon, to this Court, with all convenient speed.

Witness my hand, this_____day of February, 1973.

_____
Register.

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FILED IN CLERK'S OFFICE
NORTHERN DISTRICT OF ALABAMA
MAR 8 - 1973
WILLIAM E. DAVIS
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Northeastern Division

GENERAL CORPORATION, et al,)
Plaintiffs,)
-vs-) NO. CA 72-194-NE
)
EUGENE SWEETON, et al,)
Defendants.)

Memorandum of Opinion and Order

This case came on for hearing on March 7, 1973, on the plaintiffs' motion for a temporary restraining order. The defendants had notice and appeared in opposition to the motion. The material facts are not in dispute, and accordingly the lack of a verified complaint or affidavit is not of itself cause to deny the relief requested.

The three plaintiffs have, until February 23, 1973, operated three "adult" motion picture theatres in Huntsville, Alabama, featuring films which by some would be classified as obscene or lewd. In January 1973, complaints were filed against each of them in the appropriate state court by the "State of Alabama, on relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama", charging them (and the owners of the properties) with the maintenance of a nuisance under Alabama Code, 1940, title 7, §§ 1091 et seq. The essence of the alleged nuisance was that the theatres constituted places "upon which lewdness. . . is conducted, permitted, continued, or exists". On February 21, 1973, a final decree was rendered in the state trial court finding that the theatres had been so operated and ordering that such locations be closed for all purposes for one year (unless sooner released under a statutory procedure), that the personal property and contents of such locations used in conducting the nuisance as so found be sold, and that the operators (and their managers) be "perpetually enjoined from maintaining a nuisance at [the particular location] or elsewhere in the County." (Emphasis added.)

Thereupon the plaintiffs brought this suit under 28 U.S.C. § 1343 and 42 U.S.C.A. § 1983, 1985(3), claiming a violation of their rights under the First Amendment and seeking to enjoin the enforcement of the state court decree. Named as defendants are Sweeton, the City of Huntsville, the City Attorney, and the Circuit Judge who issued the decree.

The relief sought is not prohibited by 28 U.S.C. § 2283. *Mitchum v. Foster*, 40 U.S.L.W. 4737 (S.Ct. June 1972). The state court proceedings sought to be enjoined are not criminal proceedings, and have been considered by the Fifth Circuit of Appeals as constituting a purely civil cause. *80 Drive-In, Inc. v. Bailey*, ____F.2d _____ (5th Cir., #71-3121, October 5, 1972); *cf. Palato v. McAuliffe*, ____F.2d____(5th Cir., #71-2625, September 21, 1972).

Nevertheless, I conclude that the doctrines of comity and federalism as expressed in the *Younger v. Harris* sextet, 401 U. S. 37 et seq. (1971), are generally applicable, albeit with diminished intensity, to state court civil actions. *Cf. Hobbs v. Thompson*, 448 F.2d 456 (5th Cir., 1971); *Palato v. McAuliffe*, *supra*. See *Hobbs* also for discussion of the concepts of abstention and exhaustion.

One of the factors for consideration on the issuance of a temporary restraining order is the likelihood of the plaintiffs' prevailing on the merits. It is quite possible that the plaintiffs here will prevail on the merits in attacking an injunction which silences them at three specific locations in the city which have been held to constitute a nuisance, not merely as to presenting films which have been declared by a court to be lewd but as to future films which might or might not so be classified. But it may also be that a state can, on the basis of repeated presentation of obscene films (I assume such to be the case, without deciding) at a particular location, control all "speech" by that person at that same spot. I conclude that there is sufficient doubt as to the likelihood of plaintiffs' succeeding

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in that aspect of their suit regarding in rem nature of the nuisance suit as to deny them that relief on a temporary restraining order. (This is not to decide against plaintiffs on the merits of such claim, which must await full hearing, whether before a three-judge panel under 28 U.S.C. §§ 2281, 2284, or before a single judge.

However, so far as the state court decree attempts to silence (or "chill") these plaintiffs at other locations in Madison County--i.e., perpetually enjoining them in personam "from maintaining a nuisance . . . elsewhere in the county"--I conclude that the plaintiffs will in all probability prevail on the merits of such claim at final hearing. See Near v. Minnesota, 283 U.S. 697. As an anticipatory closing of speech possibly protected by the First Amendment, this part of the injunction constitutes furthermore an extraordinary circumstance with great and immediate harm to the plaintiffs, justifying intervention in state court proceedings by a federal court. (As to that part of the decree which calls for the sale of the personal property and contents at the theatres, the defendants have advised the court that they will not go forward with such sales without first advising this court and the plaintiffs in advance, and accordingly, without regard to whether there should otherwise be cause to stay such proceedings, I conclude that preliminary injunctive relief against such proceedings is not necessary.)

O R D E R

Upon the findings and conclusions, and for the reasons indicated, it is hereby ORDERED that upon filing by plaintiffs of a bond in the amount of $1,000 pursuant to Rule 65(c), the defendants Eugene Preston, Charles H. Younger (in his capacity as city attorney for the City of Huntsville), the Honorable John D. Snodgrass (in his capacity as Circuit Judge of the Circuit Court in Equity for Madison County, Alabama), and the City of Huntsville, be, and they hereby are, enjoined from enforcing the following provision of the orders heretofore rendered on February 23, 1973, in case number 30846, 30847, and 30848: "That the

respondents are perpetually enjoined from maintaining a nuisance at [described location of threatre] Huntsville, Alabama, or elsewhere in the county." This order in no respect annuls or vitiates the provisions of paragraph 3 of each orders.

This order shall expire upon the holding of a hearing under 28 U.S.C. § 2284(3,4) unless sooner revoked by this court.

This the 7th day of March, 1973.

John C. Godbold
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

TO : Honorable Sam C. Pointer, Jr. DATE: March 19, 1973

FROM : John R. Brown

RECEIVED
MAR 21 1973
SAM C. POINTER, JR.
U. S. DISTRICT JUDGE

SUBJECT : No. 72-194, General Corp. v. Sweeton

My dear Judge Pointer:

I was on the verge of constituting a three-Judge Court but considering it further I have lots of doubts.

Mitchum v. Foster merely holds that §2283 is no bar to a §1983 suit. But most of the cases in the Younger v. Harris group were §1983 suits. As I read Mitchum, it very carefully perserves the equitable restrictions set up in Younger and the related cases. What Mitchum does is avoid any problems posed by §2283 as such. In many cases §2283 will be an obstacle which has to first be hurdled before getting to Younger v. Harris equitable consideration.

It strikes me that we have something even more serious from an equitable standpoint. As I understand it from hurriedly reading the papers, a final decree in the Alabama Courts has been entered in 1973 requiring that the theaters be closed. I know of no right to enjoin the enforcement of a State Court decree.

The easy way out, of course, is to constitute a three-Judge Court. This burden is so heavy now on Judges, both District and Circuit who have to travel from place to place to consider the preliminary matters, that I like to ascertain in advance whether there is any sound basis for constituting the three-Judge Court.

I would suggest that you call for extended briefs on this, and I am taking the occasion to send copies of this letter on to Judges Gewin and Godbold with whom I would urge you to consult very freely and informally. It will fall to one of them. If there is doubt, then the safe course is to constitute a Court and I will do so immediately.

Hon. Sam C. Pointer, Jr.
March 19, 1973
Page 2

I would think that this thing is sort of analogous to this sort of situation. Suppose a case in which a criminal charge has been initiated that involves a constitutional denial of a kind which the prosecution could be enjoined either under Younger v. Harris, §2283 or both, but the case goes to trial with no such effort made. Can a Federal Court after the decree of conviction and the affirmance on the Appellate Court enjoin it? I think not. I see no real difference here simply because this is a civil proceeding.

This view, of course, recognizes that out of the sheer magnitute of this general problem we have to be careful that we do not encourage more and more three-Judge requests and add to the burdens which are already considerable.

Will you please put Judges Gewin and Godbold in possession of the necessary papers.

Sincerely yours,

JRB

JRB:sb
cc: Hon. Walter P. Gewin
Hon. John C. Godbold

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

PURSUE, LTD., a Delaware Corporation, Plaintiff	)	Civil No. 72-432
-vs-	)	NOTICE OF APPEAL TO THE
LAWRENCE S. HUFFMAN, in his capacity as Prosecutor, Allen County, Ohio, EDWARD FAIR, in his capacity as Sheriff of Allen County, Ohio, Defendants	)	SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lawrence S. Huffman, in his capacity as Prosecutor, Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County, Ohio, the Defendants above-named, hereby appeal to the Supreme Court of the United States from the final order of judgment of this Court, entered in this action on April 20, 1973, declaring certain portions of Ohio Revised Code Section 3767.04 and 3767.06 unconstitutional, and enjoining the Defendants from executing that portion of the Allen County Common Pleas Court's judgment of November 30, 1972, which orders the closing of Plaintiff's theatre pursuant to Ohio Revised Code Section 3767.06.

COUNSEL FOR DEFENDANTS

Lawrence S. Huffman
LAWRENCE S. HUFFMAN
127 N. Pierce Street, P. O. Box 546
Lima, Ohio 45802 (419) 229-0786

RICHARD M. BERTSCH
910 Leader Building
Cleveland, Ohio 44114 (216) 696-1433

James J. Clancy
JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California 91352
(213) 352-2069

FILED
May 16, 3:01 P.M., 1973
Clerk, U.S. District Court
Northern District of Ohio

FILED
SEP 17 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,
Appellants,

v.

PURSUE, LTD.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION TO DISMISS OR AFFIRM

ROBERT EUGENE SMITH,
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Baltimore, Maryland 21203
(301) 752-2400

GILBERT H. DEITCH,
Suite 2005
One Hundred Colony Square
1175 Peachtree Street, N.E.
Atlanta, Georgia 30361
(404) 892-8890

Attorneys for Appellee.

Of Counsel:

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435 South Hawley Street
Toledo, Ohio 43609
(419) 248-5351

The Paul M. Harrod Company, Baltimore, Maryland 21234

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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,
Appellants,

v.

PURSUE, LTD.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION TO DISMISS OR AFFIRM

Appellee, in the above styled case, moves this Honorable Court to dismiss the appeal herein on the grounds hereinafter set forth, or in the alternative to affirm the judgment sought to be reviewed on the appeal upon the grounds that it is manifest that the questions upon which the decision of this cause rest are so unsubstantial as not to need further argument, and/or the judgment rests on adequate statutory and constitutional principles.

STATEMENT OF THE CASE

Lawrence S. Huffman, an Appellant herein, on September 18, 1972 filed a Complaint in the Court of Common Pleas for Allen County, Ohio seeking abatement of CINEMA I THEATRE as a public nuisance under *Ohio Revised Code* §§ *3767.04* and *3767.06*. An Amended Complaint was filed on September 20, 1972.

On October 24, 1972 the Court of Common Pleas for Allen County, Ohio ordered the CINEMA I THEATRE closed as a public nuisance until hearing on a Permanent Injunction. *Ohio Revised Code* § *3767.04*.

On October 26, 1972 the operator (William H. Dakota) of CINEMA I filed a Civil Rights Action in United States District Court for the Northern District of Ohio, Western Division. Civil Case. No. 72-384.

On November 2, 1972, United States District Court Judge Walinski entered an Order granting a Temporary Restraining Order staying so much of the State Injunction "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing."

On November 7, 1972 a hearing was held in the Court of Common Pleas of Allen County, Ohio and continued the hearing until November 30, 1972.

On November 22, 1972, Appellant Huffman had served on the agent, servant and employee of the new theater operator, PURSUE, LTD. a copy of the Allen County Court Temporary Restraining Order of October 24, 1972.

On November 30, 1972, the Court of Common Pleas reconvened and heard evidence on the Permanent Injunction. Gilbert H. Deitch, Esquire, of the Georgia and Tennessee Bars, appeared in Court on behalf of the operator of CINEMA I, PURSUE, LTD., and was refused the right to speak or contest the evidence or argue the applicable law. It is incorrect, as stated on page 12 of Appellant's Jurisdictional Statement, to say that counsel was not present at the hearing. Counsel was present and was not permitted to participate in the proceedings on behalf of PURSUE, LTD., the operator of CINEMA I THEATER in Lima, Ohio.

On November 30, 1972, the Allen County Common Pleas Court granted a Permanent Injunction against the premises, declared it a public nuisance, and ordered all personal property sold at public auction and ordered it padlocked for one (1) year. Within two (2) hours after the entry of the Order, the theater was padlocked by law enforcement officials.

PURSUE, LTD., having been denied the right to appear in Allen County Common Pleas Court, and the theater being closed, filed a new proceeding in the United States District Court, with a request for a Temporary Restraining Order.

Counsel for Appellant Huffman, having been notified of the application for a Temporary Restraining Order, to be heard on the afternoon of December 1, 1972, and refusing to appear, the United States District Court issued a Limited Temporary Restraining Order.

On December 11, 1972 the chief judge of the Sixth Circuit Court of Appeals designated a statutory three-judge court.

The statutory three-judge court heard oral argument on March 12, 1973, counsel for all parties appearing.

On April 20, 1973 the Court issued its Opinion and Order (see Appendix A3 – A12 of Jurisdictional Statement).

On or about May 23, 1973 Appellants Huffman and Fair filed the following documents in this Court:

(a) Motion for Leave to File Petition for Writ of Mandamus or Prohibition, Petition for Writ of Mandamus or Prohibition, and Brief in Support Thereof (No. 72-1613);

(b) Motion to Advance Date Set for Filing of Briefs in Opposition to Petition;

(c) Application to Honorable Potter Stewart for Stay Order or Writ of Injunction. (Application A-1199)

On June 12, 1973 Justice Stewart denied Appellants' Application for Stay.

On June 25, 1973 Appellants' Application for Stay or Writ of Injunction, referred to the entire Court by Justice Stewart, was denied.

On August 14, 1973 Appellants filed a Jurisdictional Statement in this Court.

THE JUDGMENT OF THE STATUTORY THREE-JUDGE COURT BELOW RESTS UPON PROPER AND ADEQUATE STATUTORY AND CONSTITUTIONAL GROUNDS AND/OR NO SUBSTANTIAL QUESTION IS PRESENTED FOR REVIEW BY THIS COURT.

The Ohio trial court issued a permanent injunction on November 30, 1972 in a civil action instituted by Appellant

Huffman closing Cinema I Theatre. Said injunction was based upon evidence introduced by Huffman – 16 motion picture films – disseminated at Cinema I Theatre, Lima, Ohio by parties other than PURSUE, LTD. which Counsel for Appellee admitted at oral argument before the three-judge court.

Ohio Revised Code § *3767.04* permits the closure of a premises *pending* litigation and § *3767.06* permits permanent injunctive measures.

With regard to Appellants' claim that the Court below improperly interfered with state proceedings, it should be noted:

(1) the state proceedings were civil in nature;

(2) the Complaint filed in the Federal forum concerning Cinema I Theatre preceded the state court's final judgment;

(3) the judiciary of Ohio has authoritatively construed the statutory provisions at bar to permit that which the Court below found to be unconstitutional.

The Court below was properly convened, considering the substantial constitutional questions presented by Appellee. *Gossby v. Osser*, 409 U.S. 512 (1973)

The Court below did not improperly interfere with state proceedings. In *Gibson v. Berryhill*, ____ U.S. ____, 36 LEd.2d 488, 93 S.Ct. _____ (1973), this Court discussed the anti-injunction statute:

"28 USC § 2283 [28 USCS § 2283], the anti-injunction statue, prohibits federal courts from enjoining state court proceedings, but the statute

excepts from its prohibition injunctions which are 'expressly authorized' by another Act of Congress. Last Term, after the District Court's decision here, this Court determined that actions brought under the Civil Rights Act, 42 U.S.C. § 1983 [42 USCS § 1983], were within the 'expressly authorized' exception to the ban on federal injunctions. Mitchum v. Foster, 407 US 225, 32 L Ed 2d 705, 92 S Ct 2151 (1972)."

Respecting equity, comity and federalism, the Court further stated:

"As we expressly stated in Mitchum, nothing in that decision purported to call into question the established principles of equity, comity and federalism which must, under appropriate circumstances, restrain a federal court from issuing such injunctions. Id., at 243, 32 L Ed 2d 705. These principles have been emphasized by this Court many times in the past, albeit under a variety of different rubrics. First of all there is the doctrine, usually applicable when an injunction is sought, that a party must exhaust his available administrative remedies before invoking the equitable jurisdiction of a court. See, e.g., Prentis v. Atlantic Coast Line Co., 211 US 210, 53 L Ed 150, 29 S Ct 67 (1908); Illinois Commerce Comm'n v. Thomson, 318 US 675, 87 L Ed 1075, 63 S Ct 834 (1943). Secondly, there is the basic principle of federalism, restated as recently as 1971 in Younger v. Harris, 401 US 37, 27 L Ed 2d 669, 91 S Ct 746 (1971), that a federal court may not enjoin a pending state criminal proceeding in the absence of special circumstances suggesting bad faith, harassment or irreparable injury that is both serious and immediate. And finally, there is the doctrine, developed in our cases at least since Railroad

Commission v. Pullman, 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941), that when confronted with issues of corstitutional dimension which implicate or depend upor settled questions of state law, a federal court ought to abstain and stay its proceedings until those state law questions are definitely resolved."

The Court below was not confronted with enjoining a criminal prosecution; therefore, *Younger v. Harris*, 401 U.S. 37 (1971) did not require abstention; and further, any attempt to litigate the Ohio statutes through the state appellate process would have been futile in that the Ohio nuisance law at issue has been upheld by appellate courts of Ohio.

(a) *Keating v. a Motion Picture Film entitled "Vixen"*, 272 N.E.2d, 137 (1971);

(b) *Ewing v. A Motion Picture Film entitled "Without a Stitch,"* 276 N.E.2d 655 (1971);

(c) *Dowd v. a Motion Picture Film entitled "Pay the Babysitter,"* 31 O.Misc. 208 (1972).

The cases listed as (a), (b) and (c) above are under appeal to the Supreme Court of the State of Ohio. Clearly Appellants cannot seriously urge that Appellee herein can litigate its federal constitutional claim through the State Court Appellate system with due consideration to the extensive delay in the final adjudication of one's First Amendment rights. (See *Freedman v. Maryland*, 380 U.S. 51, (1965), wherein a delay of six months was condemned; and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, wherein a delay of four months was condemned.)

Most recently Chief Justice Burger, writing for a majority of the Court held that injunctive relief against dissemination of a particular motion picture film must await a final decision on appeal. *Paris Adult Theatre I v. Slaton*, ____ U.S. ____, 37 LED2d 446, 455 (1973)

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of Blount v. Rizzi, 400 US 410, 417, 27 L Ed 2d 498, 91 S Ct 423 (1971); Teitel Film Corp. v Cusack, 390 US 139, 141-142, 19 L Ed 2d 966, 88 S Ct 754 (1968); Freedman v Maryland, 380 US 51, 58-59, 13 L Ed 2d 649, 85 S Ct 734 (1965), and Kingsley Books, Inc. v Brown, supra, 354 US, at 443-445, 1 L Ed 2d 1469 (1957), were met. Cf. United States v Thirty-Seven Photographs, 402 US 363, 367-369, 28 L Ed 2d 822, 91 S Ct 1400 (1971) (opinion of White, J.)."

Also, in *Heller v. New York*, ____ U.S. ____, 37 LED2d 745 (1973) the Court ruled:

> "In United States v Thirty-Seven Photographs, 402 US 363, 28 L Ed 2d 822, 91 S Ct 1400 (1971), and Freedman v. Maryland, 380 US 51, 13 L Ed 2d 649, 85 S Ct 734 (1965), we held that 'because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint*.' 402 US, at 367, 28 L Ed 2d 822, quoting 380 US, at 58, 13 L Ed 2d 649 (emphasis added).
>
> Petitioner's reliance on the Court's decision in a Quantity of Copies of Books v Kansas, 378 US 205, 12 L Ed 2d 809, 84 S Ct 1723 (1964), and Marcus v Search Warrant of Property, 367 US 717, 6 L Ed 2d 1127, 81 S Ct 1708 (1961), is misplaced. Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid 'danger of abridgement of the right of the public in a free soceity to unobstructed circulation of non-obscene books.' Quantity of Copies of Books v Kansas, supra, 378 US, at 213, 12 L Ed 2d 809 (1964). We do not disturb this holding. Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of Quantity of Copies of Books and Marcus are fully met. *'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'* New York Times Co. v United States, 403 US 713, 714, 29 L Ed 2d 822, 91 S Ct 2140 (1971) quoting Bantam Books, Inc. v Sullivan, 372 US 58, 70, 9 L Ed 2d 584, 83 S Ct 631 (1963). Organization for a Better Austin v Keefe, 402 US 415, 419, 29 L Ed 2d 1, 91 S Ct 1575 (1971). Carroll v Comm'rs of Princess Anne, 393 US 175, 181, 21 L Ed 2d 325, 89 S Ct 347 (1968). See Near v Minnesota, 283 US 697, 75 L Ed 1357, 51 S Ct 625 (1931)." (Emphasis supplied)

A fortiorari, as the Court below ruled, the statutory system authorized in Ohio to close a theatre and enjoin dissemination of *any* motion picture films is repugnant to *First Amendment* rights of Appellee. The consistent rulings of this Court on impermissible prior restraints, as cited above in *Heller*, leave no room for doubt that the Court below was correct in its ruling.

CONCLUSION

Appellee, therefore, respectfully requests this Court on the basis of arguments set forth herein, to dismiss the appeal from the United States District Court for the Northern District of Ohio and/or in the alternative, to affirm that Court's judgment.

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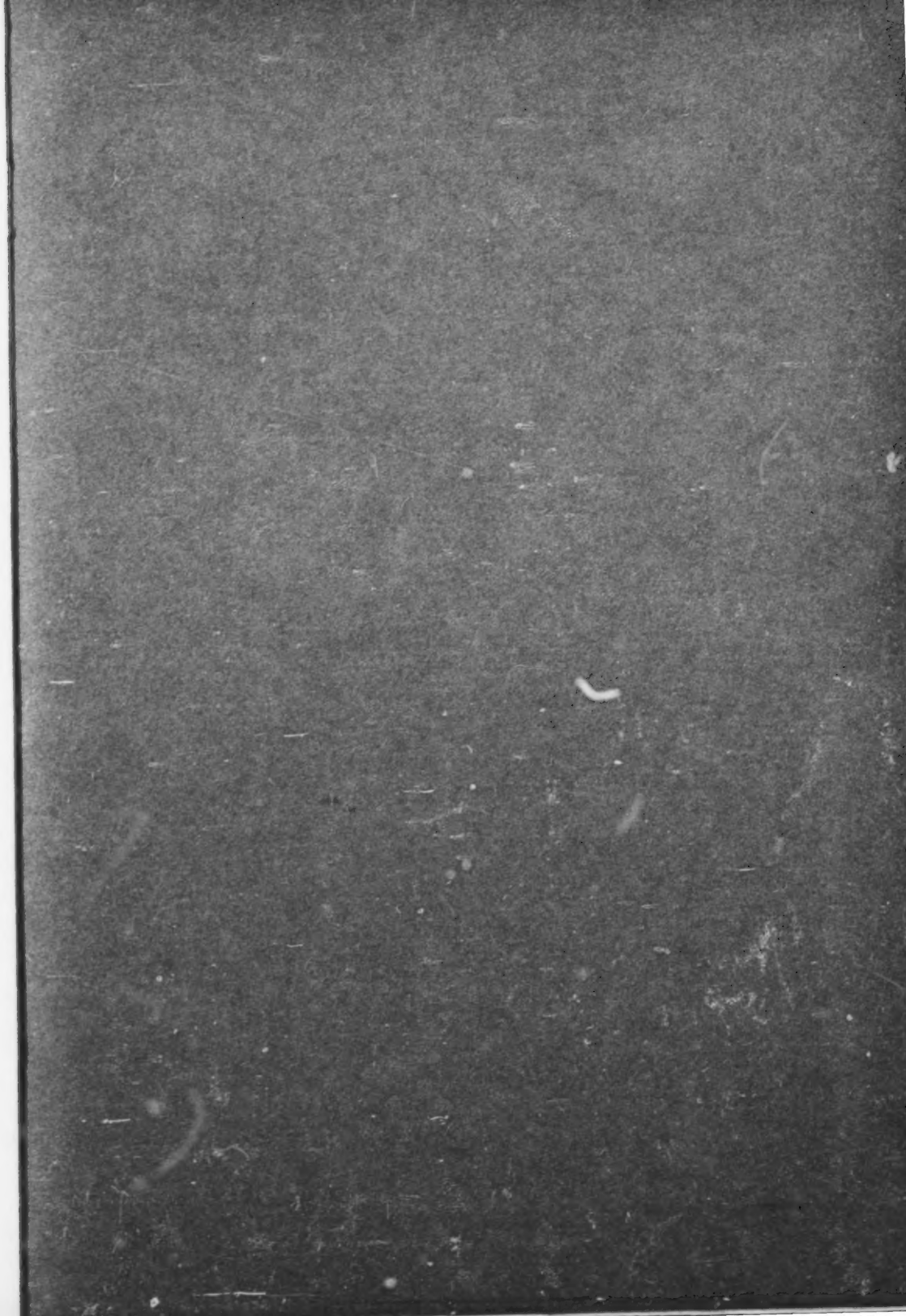

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

Supreme Court, U. S.
FILED
JUN 10 1974
MICHAEL RODAK, JR., CLERK

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LTD.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio,

Appellants,

v.

PURSUE, LTD.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR APPELLANTS

Appellants appeal from the judgement of the United States District Court for the Northern District of Ohio, Western Division (Celebrezze, Circuit Judge, and Young and Walinski, District Judges), entered on April 20, 1973, holding Ohio Revised Code Sections 3767.04 and 3767.06 to be unconstitutional and enjoining appellants herein from executing that portion of the Allen County Common Pleas Court's final judgment of Nov. 30, 1972, in *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et al*, Court of Common Pleas of Allen County, Ohio, Case Number 72 CIV 0326,

which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio "for a period of one year unless sooner released by order of (the Common Pleas) Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the revised Code of Ohio".

OPINION BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division, has not been reported. A copy of the Opinion and Order, as filed on April 20, 1973, is reprinted in the Appendix at pages A3-11.

JURISDICTION

On Dec. 1, 1972, Appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd., v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio and Edward Fair, in his capacity as Sheriff of Allen County, Ohio*, CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Sections 1983 and 1985, together with motions for a temporary restraining order, preliminary and final injunction, and an application for a 3-judge court. On Dec. 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, and District Court Judges Nicholas J. Walinski and Don J. Young as members of the Three-Judge District Court, which on April 20, 1973, handed down the aforementioned opinion and order.[1] A Notice of Appeal was filed in the United States District Court on May 14, 1973 and the Jurisdictional Statement

[1] On June 1, 1973, Appellants Huffman and Fair petitioned this Court for a Writ of Mandate or Prohibition in Huffman et. al v. The United States District Court for the Northern District of Ohio, Western Division et al, No. 72-1613 and also made application to Justice Potter Stewart for a stay order or writ of injunction and an order to advance the date set for filing of briefs in opposition to the petition. On June 25, 1973, both matters were referred to the Court as a whole and denied in Huffman et al v. U.S. District Court for The Northern District of Ohio, et al ___ U.S. ___, 37L.Ed2d 1039, ___S.Ct.___ (June 25, 1973).

was filed on August 14, 1973. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Bailey v. Patterson*, 369 U.S. 31, 34, 7 L.Ed. 2d 512, 82 S.Ct. 549 (Feb. 26, 1962).

QUESTIONS PRESENTED

1. Whether it was the intent of Congress, in enacting the Civil Rights Act of 1871 (42 U.S.C. Sections 1983 and 1985), to authorize a federal cause of action, where the state action against which relief is sought, is a civil action in rem brought in the name of the people of the State of Ohio, which pleads specifically the violation of specific state standards for sexual conduct in public in the form of obscene motion picture films being exhibited as a regular course of conduct, and which seeks to abate the place where such conduct takes place, as a disorderly house.

2. Assuming that, in theory, a cause of action can be stated under 42 U.S.C. Section 1983 and 1985 of the Civil Rights Act; (a) whether Pursue Ltd. failed to plead the highly specific facts required for such a cause of action; (b) whether the federal court erred in failing to examine the nature of Dakota's course of conduct which was alleged and proved in the state court action and pleaded by encorporation in the Pursue Ltd. complaint; and (c) whether the federal court erred in failing to grant appellants' motion to dismiss the complaint as a sham pleading, brought in bad faith and to perpetuate a fraud on the court, where the affidavits in support of appellants' motion to dismiss showed Pursue Ltd. to have engaged in the same course of conduct after Judge Walinski's temporary restraining order on December 1, 1972, as was condemned as a public nuisance by the state trial court (abatement action against Dakota) before the temporary restraining order.

3. Whether the facts alleged provide a basis for equitable jurisdiction and federal intervention under *Younger v. Harris* and *Mitchum v. Foster;* and whether such facts presented a

substantial federal question for the invocation of a three-judge district court to consider the constitutionality of the Ohio Nuisance Statute.

4. Whether, under the doctrine of lis pendens, Pursue Ltd. had standing, under an assignment of the leasehold interest in 69 Public Square, Allen County, Ohio, to prosecute the Civil Rights action entitled, *Pursue, Ltd. v. Huffman, et al.*, 72 C 432, filed by it on Dec. 1, 1972; where, on the date that Pursue, Ltd. acquired such interest from William H. Dakota, Nov. 17, 1972, a civil action entitled *Ohio ex rel Huffman v. William H. Dakota, et al., 72* CIV 0326 was on file in the Allen County, Ohio, Common Pleas Court, seeking to abate the premises and forfeit the lease at 69 Public Square; of which filing appellee Pursue Ltd. had actual notice from the inception of its existence as a corporation, through its incorporating attorneys and also by service of process on Robert Hollis, its president, on Nov. 22, 1972; which complaint described said premises both by metes and bounds and and by street address and named the owners of such real property and assignor, William H. Dakota as defendants, and over which property and persons the Allen County Common Pleas Court had acquired jurisdiction; and where on Nov. 30, 1972, the day before such federal action was filed by Pursue, Ltd., a final judgment was entered in the Allen County Common Pleas Court, forfeiting for a period of one year the leasehold interest of defendant-assignor William H. Dakota in the premises of 69 Public Square upon which interest Pursue, Ltd. was relying; and where such final judgment was known to appellee at the time such federal action was filed, having been alleged as a fact by Pursue, Ltd. in its Complaint at page 5, paragraph 18.

5. Whether, under the manditory provisions of 28 U.S.C. Section 2283, the United States District Court had authority to grant any injunctive relief; i.e., whether the equitable claim should not have been dismissed for lack of jurisdiction, where it appeared on the face of the complaint that:

(a) the real property which was the subject of the action was in custodia lex in the "in rem" state court proceedings, and

(b) the state appellate process was already in train, in that a final judgment had already been entered by the state trial court.

6. Whether the Ohio obscenity statute, as construed by the Ohio judiciary and as applied by the trial judge, complied with the specificity requirements enunciated in *Miller v. California*, decided by this Court on June 21, 1973.

7. Whether certain sections of the Ohio Nuisance Statute, entitled "Disorderly Houses" are constitutional: namely,

(a) Whether Section 3767.04 of the Ohio Revised Code is constitutional, i.e., whether under a special statutory procedure declaring a place which exhibits an obscene motion picture film to be a public nuisance and providing for its abatement, the Federal Constitution prohibits the State Legislature from establishing as a mandatory penalty, after a hearing on a temporary injunction had upon five days' notice, that, upon a judicial finding by a trial court that such a public nuisance exists, the leasehold interest where such public nuisance is conducted or maintained and the personal property and contents located and used therein shall be forfeited until final decision is rendered on the application for a permanent injunction unless either of two conditions is shown to exist, namely: 1. That the person "owning, in control, or in charge of the nuisance so enjoined...." affirmatively "shows to the satisfaction of the court. . . that the nuisance complained of is abated. . . .", or 2. That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by the statute and has regained possession of the premises; where such statute also allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein, and to regain possession of such real property by fulfilling three requirements, namely, 1. Payment of all costs incurred; 2. Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until

decision by the court on the application for a permanent injunction, and 3. Satisfying the court of his good faith; and where such statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two requirements, namely, 1. Payment of all costs incurred, and 2. Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

(b) Whether Section 3767.06 of the Ohio Revised Code is constitutional, i.e., whether under a special statutory procedure declaring a place which exhibits an obscene motion picture film to be a public nuisance and providing for its abatement, the Federal Constitution prohibits the state legislature from establishing as a mandatory penalty after a hearing on a permanent injunction that, upon a judicial finding by a trial court that such a public nuisance exists, the same shall be abated and the leasehold interest where such public nuisance is conducted or maintained shall be forfeited for a period of one year from the date of the final order of abatement unless sooner released by order of the court, and that the personal property and contents located and used therein and not already released, (as authorized by Section 3767.04), shall be forfeited and sold not earlier than 10 days after such final order of abatement and in the manner provided for the sale of chattels under execution; where such statute also allows the owner of any real property so restricted to renter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely, 1. Payment of all costs incurred; 2. Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and 3. Satisfying the court of his good faith; and where such statute also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements,

namely, 1. Payment of all costs incurred, and 2. Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

8. Whether, under this Court's decision in *Steffel v. Thompson* on Mar. 19, 1974, the United States District Court had authority to grant declaratory relief.

STATUTORY PROVISIONS INVOLVED

The Ohio Nuisance Statute entitled "Disorderly Houses" being sections 3767.01 through 3767.11 of the Ohio Revised Code, is reprinted in the Appendix, page B1-10. The specific standards for the term "obscene" prescribed by the Ohio legislature in Ohio Revised Code section 2905.34 appears herein, at page 74 .

STATEMENT OF FACTS

On September 18, 1972, at 1:06 P.M., appellant Lawrence S. Huffman, as prosecuting attorney of Allen County Ohio, filed a complaint in the Court of Common Pleas of Allen County, Ohio, entitled "State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al, Case No. 72 CIV 0326," seeking the abatement of the Cinema I Theatre located at 69 Public Square, Lima, Ohio, as a public nuisance. A copy of said complaint is reprinted in the Appendix at pages C3-14. Such action was commenced pursuant to Section 3767.03 of the Ohio Revised Code (see Appendix at page B-3.) At the same time, appellant Huffman filed his Motion for Temporary Injunction, a copy of which is reprinted in the Appendix at pages C15-17.

The Court of Common Pleas assigned appellant Huffman's Motion for Temporary Injunction in State of Ohio ex rel *Huffman v. William H. Dakota* for September 26, 1972, at 9:30 A.M. A copy of said Notice for Hearing is reprinted in the Appendix at page C18. . On the same date, the Clerk of the Common Pleas Court issued a subpoena duces tecum addressed to William H. Dakota and John Does 1 and 2, requiring them to appear and testify on behalf of the plaintiff

in said action and to bring with them the 21 motion picture films listed below which were exhibited at that theatre during the dates indicated:

"Man and Wife"	July 12-18, 1972
"Hollywood Babylon", "Down and Dirty", and Previews	July 19-23, 1972
"The Hangup", "The Cutthroats", and Previews	July 25-Aug. 1, 1972
"Wow, Its Cindy", "Hot Spurs", and Previews	Aug. 2-8, 1972
"Prostitution, Pornography, U.S.A." "Oddly Coupled" and Previews	Aug. 9-15, 1972
"Sandra, The Making of a Woman", "Diamond Stud" and Previews	Aug. 16-22, 1972
"Midnight Plowboy", "Tobacco Roody" and Previews	Aug. 23-29, 1972
"The Blue Hour" "The Grabbers" and Previews	Aug. 30-Sept. 5, 1972
"Sweet Georgia", "The Exotic Dreams of Casanova" and Previews	Sept. 6-12, 1972
"Marriage Manual", "Love Under 17", and Previews	Sept. 13-18, 1972

"The Pig Keeper's Daughter", "Please Don't Eat My Mother", and Previews	Sept. 19-25, 1972

A copy of said Subpoena Duces Tecum is reprinted in the Appendix at pages C19-21.

On September 18, 1972, at approximate 2:40 P.M., a deputy sheriff personally served a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum on the following persons at the Cinema I Theatre, 69 Public Square, Lima, Ohio:

John Doe No. 1, later identified as John Brownell; and

John Doe 2, later identified as Robert Smith;

Also served with the documents aforementioned, with the exception of the subpoena duces tecum and in lieu thereof, a subpoena, were John Doe 3, later identified as Allen R. Brown, and Jane Doe No. 1, later identified as Geraldine Scott. At the time of the service of these documents, John Brownell was the projectionist at the Cinema I Theatre; Robert Smith was the person in charge of said theatre in the absence of the manager, William H. Dakota; Allen R. Brown was the ticket taker and Geraldine Scott was the ticket seller.

On the evening of Sept. 18, 1972, William H. Dakota was served with a summons and copies of the Complaint, Motion for Temporary Injunction, Notice for Hearing, and Subpoena Duces Tecum at the Cinema I Theatre, No. 69 Public Square, Lima, Ohio.

The owners of the premises, also named as defendants in appellant Huffman's abatement action, were subsequently served with process.

On Sept. 20, 1972, appellant Huffman filed an amended complaint in the Court of Common Pleas and thereafter copies of the Amended Complaint were served upon all of the persons previously served as aforementioned. A copy of the Amended Complaint is reprinted in the Appendix at pages D3-10.

On Sept. 26, and Sept. 27, 1972, the Court of Common Pleas of Allen County, Ohio, convened a hearing on appellant Huffman's Motion for Temporary Injunction in State of Ohio *ex rel Huffman v. William H. Dakota et al*, at which time, the defendants in the abatement action were present and represented by counsel. Evidence was presented, including the viewing by the Court of four motion picture films which had been subpoenaed, entitled "Love Under 17", "Marriage Manual", "The Pig Keeper's Daughter", and "Please Don't Eat My Mother," and previews of coming attractions. At the conclusion of the presentation of evidence on Sept. 27, 1972, the court ordered that the matter be continued to Oct. 2, 1972, at which time additional evidence was presented by both the plaintiff and the defendants, after which the parties rested. At no time did the defendants offer any evidence to the court that the nuisance complained against had been abated. The Court took the matter under advisement and announced that a decision on the temporary injunction would be made forthwith.

On Oct. 24, 1972, the Court of Common Pleas of Allen County, Ohio, announced its decision in State of Ohio *ex rel Huffman v. William H. Dakota et al*, and journalized its order. A copy of such order is reprinted in the Appendix at pages E3-5. In its order the Court made the following findings: 1. That a nuisance exists as alleged at the Cinema I Theatre, 69 Public Square, Lima, Ohio, which should be abated forthwith: 2. That the realty is owned by the defendants Leland Samuel Collins, Flora Mary Collins Moor, and Sara Lee Collins Wallace; and 3. That William H. Dakota is the person in charge of said theatre and is maintaining said nuisance, and that the defendants Smith, Brown, Brownell and Scott are employed at said theatre. The court ordered the Cinema I Theatre closed, restrained the defendants from removing or in any manner interfering with personal property and contents of the premises at Cinema I Theatre until further order of the Court and ordered the officer serving the Court's order to forthwith make and return into court an inventory of the personal property and contents situated in the

building and used in conducting or maintaining the motion picture projection and screening therein. The Court also ordered the defendants to show cause, if any they can, why the closing order should not be made permanent as of that date.

The premises known as Cinema I Theatre, 69 Public Square, Lima, Ohio, was closed pursuant to said order of the Allen County Common Pleas Court and the statutory mandate of O.R.C. Section 3767.04.

On October 26, 1972, William H. Dakota, the defendant in the state abatement action, *Ohio ex rel Huffman v. William H. Dakota et al*, filed a civil rights complaint in the United States District Court, Northern District of Ohio, Western Division, entitled *"William Dakota v. Edward Fair, Sheriff, and Joe Garlock, Deputy Sheriff, Civil Case No. 72-384,"* alleging a cause of action under 42 U.S.C. Section 1983, together with Motions for a Temporary Restraining Order, a Preliminary Injunction, and to convene a 3-judge panel. Dakota also filed a "Memorandum of Law on Effect of Removal on State Court Action" in the Allen County Common Pleas Court on the same date. A copy of said pleadings is reprinted in the Appendix at pages F3-27. Arguments on the Motion for Temporary Restraining Order were heard on October 30, 1972, and the matter was taken under advisement.

Thereafter, United States Federal District Judge Nicholas J. Walinski, Northern District of Ohio, Western Division, ruled, in an opinion and order filed in said federal action on Nov. 2, 1972, that the injunction of the state court, "has been overbroadly applied" and flew directly in the face of the United States Supreme Court decision in *Near v. Minnesota*, 283 U.S. 697 (1931), and ordered that the state court injunction be stayed "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing." Judge Walinski further stated in his opinion that since the Ohio court may interpret the statute constitutionally upon a hearing for the permanent injunction, he would "reserve a ruling on the convening of a 3-judge panel under 28 U.S.C. Section 2284 until such time as the federal abstention

doctrine is inapplicable." A copy of Judge Walinski's opinion and order is reprinted in the Appendix at pages G3-5.

In an attempt to comply with Federal District Judge Walinski's order of Nov. 2, 1972, appellant Huffman on Nov. 5, 1972, filed a motion in the state case, *State of Ohio ex rel Huffman v. William H. Dakota, et al.* Court of Common Pleas of Allen County, No. 72 Civ 0326 alleging that on November 4, 1972, William H. Dakota had violated the terms of the Allen County Common Pleas Court order of Oct. 24, 1972 by exhibiting two obscene motion picture films, entitled "Sexual Freedom Now" and "Shoot-out at Beaver Alls (sic)", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio and asked the court to order William Dakota to appear with the films so that the court might determine whether said films were obscene and to show cause why he should not be punished as for a contempt. On the same day, the court ordered that William H. Dakota should appear in Court with said films on November 7, 1972, at 9:00 A.M., which was also the same hearing date previously scheduled for appellant Huffman's Motion for a Permanent Injunction, so that a determination could be made as to whether such films were obscene and, upon such a determination, to show cause why he should not be punished as for contempt. A copy of said motion and said court order (journal entry) is reprinted in the Appendix at pages H3-6.

On Nov. 7, 1972, the Court of Common Pleas of Allen County, Ohio, convened and evidence was presented on appellant Huffman's application for a permanent injunction. At the conclusion of the evidence presented on that date, the court, with concurrence of counsel for the plaintiff and the defendants, continued the hearing on the permanent injunction in anticipation that the suit might be settled. The hearings on the application for permanent injunction was rescheduled for Nov. 30, 1972.

On Nov. 22, 1972, upon information and belief that a new party, Robert Hollis, was violating the Common Pleas Court order of October 24, 1972, by participating in the exhibition of obscene motion picture films at the Cinema I Theatre,

appellant Huffman caused a certified copy of the Common Pleas Court order of Oct. 24, 1972, to be personally served upon Robert Hollis.

On Nov. 30, 1972, the Court of Common Pleas of Allen County, Ohio, reconvened in Ohio *ex rel Huffman v. William H. Dakota et al.* on the matter of the application for permanent injunction. Counsel for the defendant William H. Dakota and other defendants employed at the Cinema I Theatre, were not present at said hearing, having advised the court that the court could proceed in the hearing of the cause without the appearance of the defendants or their counsel. Additional evidence was presented by appellant Huffman in such state action, including testimonial evidence from police officers who had viewed 12 other motion picture films which were alleged in appellant Huffman's complaint to have been exhibited at the Cinema I Theatre and to be obscene, and documentary evidence consisting of approximately 8,000 still photographs in the form of time-motion studies of the said 12 motion picture films. Such time-motion studies consisted of a chronological series of still photographs from the motion picture films, timed in their relative order of appearance, which by stopping the movement appearing on the motion picture screen and recording the same, permitted the type of conduct being portrayed therein to be analyzed by the officer giving testimony as to what he saw exhibited at the motion picture theatre as a part of the past recollection recorded testimony of such witness.

On Nov. 30, 1972, at approximately 2:30 P.M. the Allen County Common Pleas Court granted a permanent injunction and thereafter journalized its order. A copy of said judgment entry is reprinted in the Appendix at pages I3-7. In its final judgment, the court made the following findings: 1. That the Cinema I Theatre at 69 Public Square, Lima, Ohio, is operated by defendant William H. Dakota; 2. That the defendant William H. Dakota has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene under the Ohio test for obscenity; 3. That the defendant's conduct and continuous exhibition of ob-

scene motion picture films constitutes a public nuisance as defined by the Ohio Revised Code, Section 3767.01(c); 4. That the defendants, Flora Mary Collins Moor, Leland Samuel Collins, and Sara Lee Collins Wallace are the owners of the premises being used by the defendant William H. Dakota to engage in the conduct which constitutes the nuisance; 5. That said owners leased said premises to the defendant William H. Dakota under the name of William Kern, Jr. and that the defendants Brownell, Smith, Brown, and Scott are employed at the theatre. The court ordered the following: 1. Permanently enjoining the defendants and all of the persons acting in concert or participating with them from conducting the said nuisance; 2. Assessed a tax of $300.00 against the Cinema I Theatre and against William H. Dakota personally; 3. Ordered all personal property used in conducting the nuisance as aforesaid to be removed from 69 Public Square, Lima, Ohio, and sold in the manner provided for the sale of chattels under execution; and 4. Extended its order of Oct. 24, 1972, closing the Cinema I Theatre, issued by way of preliminary injunction, and forfeited the lease and ordered it closed for any purpose for a period of one year unless sooner released by order of this court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Ohio Revised Code and ordered the defendant William H. Dakota to pay the costs therein.

Within two hours of the entry of the final judgment forfeiting the lease for a period of one year, the theatre was closed and the keys seized by law enforcement agents. (See Appendix at page J-9.

On Dec. 1, 1972, appellee corporation filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled *Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County, Ohio*, CIV 72-432, alleging a Civil Rights cause of action under 42 U.S.C. Section 1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. A copy of said complaint is reprinted in the Appendix at pages J3-18.

On Dec. 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an ex parte order in such action, "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C., Section 2248" which ordered the judgment of the Allen County Common Pleas Court in *State ex rel Huffman v. William H. Dakota et al.*, 72-CIV-0326, dated Nov. 30, 1972, stayed except "insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". A copy of said order is reprinted in the Appendix at page J-19.

In an attempt to enforce the order of the Common Pleas Court of Nov. 30, 1972, while still complying with the federal court order filed on Dec. 1, 1972, appellant filed a motion in the state court in *State ex rel Huffman v. William H. Dakota, et al.*, 72-CIV-0326, on Dec. 4, 1973, requesting that the films located at 69 Public Square, Lima, Ohio, be viewed by the court and that a judicial determination be made as to whether or not said films were obscene and upon a finding of obscenity, that the court order said films not to be exhibited at 69 Public Square, Lima, Ohio, and set Dec. 4, 1972, as the hearing date. A copy of said motion and notice of hearing is reprinted in the Appendix at page K-3.

On Dec. 4, 1972, upon notice to counsel for defendant Robert Smith and Robert Hollis, the Court of Common Pleas of Allen County, Ohio, convened in *Ohio ex rel Huffman v. William H. Dakota, et al.* 72 CIV 0326 to hear Appellant Huffman's motion therein for a hearing on said films and the court viewed the motion picture film entitled "Sexual Freedom in Denmark." said film having been subpoenaed by appellant Huffman. The court granted the request of Ted Iorio, counsel for Robert Smith and Robert Hollis, to withhold making a decision as to the obscenity of said motion picture film to enable counsel to present evidence that said motion picture film was not obscene, and set the matter for hearing on Dec. 12, 1972 in the Court of Common Pleas of Allen County, Ohio.

On Dec. 11, 1972, the day prior to said hearing date, counsel Ted Iorio, counsel for Robert Smith and Robert Hollis, filed a petition for removal in the United States District Court for the Northern District, Western Division, entitled *State of Ohio ex rel Lawrence S. Huffman, respondent v. William H. Dakota, et al.*, petitioner, Case No. C72-445, and Notice of Removal with the Clerk of the Allen County Common Pleas Court and served the same on Appellant Huffman. Said removal frustrated appellant's attempt to enforce the state court order while still complying with the federal court's temporary restraining order. A copy of said petition for removal and notice of removal is reprinted in the Appendix at page L3-8.

On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski, and Don J. Young as members of the three-judge District Court in *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432. On December 21, 1972, said three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. Copies of such orders are reprinted in Appendix at pages L22-25.

On December 18, 1972, appellant Huffman filed a motion to remand and supporting memorandum and a motion for immediate hearing, in *William H. Dakota et al. v. Lawrence S. Huffman*, 72 Civ 445, a copy of which is reprinted in the Appendix at pages L9-21.

On December 29, 1972, Pursue, Ltd. filed amendments to its complaint in *Pursue, Ltd. v. Huffman, et al.* 72 Civ 432 and on January 5, 1973, appellants filed their answers thereto. A copy of said amendments and answers is reprinted in the Appendix at pages M4-14.

Appellants herein filed their trial brief in the federal action, *Pursue, Ltd. v. Huffman, et al.*, 72 Civ 432 on January 16, 1973. At Point 3 of their trial brief, appellants pointed out to the three-judge court that Pursue, Ltd.'s federal lawsuit was spurious, that it constituted an abuse of the federal process and was prosecuted for the sole purpose of continuing the exhibition of obscene motion picture films and deriving as much income as possible from their exhibition;

further, that in view of the evidence in this case, Pursue, Ltd. had no reasonable hope of establishing the necessary prerequisites for success in federal intervention, namely; 1. Bad faith; 2. Harassment; and 3. Great and immediate irreparable harm. In support of those contentions, appellants attached thereto four affidavits of Deputy Sheriff Fred H. Hawk, describing the contents of eight (8) films viewed by said affiant at the Cinema I Theatre subsequent to the federal court order of Nov. 2, 1972, which reopened that theatre, and the alleged assignment of November 24, 1972, from William H. Dakota to Pursue, Ltd. Deputy Sheriff Hawk's description of the eight films viewed by him on the following dates reads as follows:

Dec. 7, 1972

"Affiant says that the credits of 'Skin Flick Madness' showed that it was produced by 'Suckit Films'; that the general theme of the movie centered about a male and female viewing a stag film, becoming excited by the various sexual acts depicted in the stag film and engaging in sexual activity themselves during the stag film; and that the movie lasted approximately 55 minutes during which time nude males and nude females were depicted on the screen engaging in several explicit acts of fellatio, sexual intercourse, lesbianism and cunnilingus.

'Affiant says that the second feature was entitled 'Okie Maid' which lasted approximately 50 minutes; that the general theme of the movie centered about the sexual activities of three men who lived together in a mountain shack; and that the movie had several explicit scenes of nude males and nude females engaged in acts of lesbianism, cunnilingus, female masturbation, group sex, sexual intercourse, rape, fellatio and anal sodomy.

"Further affiant saith not."

Dec. 14, 1972

"Affiant says that the first feature he viewed was entitled 'The Honeymoon Is Over' which lasted approximately one hour; that the general theme of the movie centered about the sexual frustrations and inadequacies of a newly married couple; and that the motion picture

contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, cunnilingus, lesbianism, and fellatio.

"Affiant further says that he viewed the second motion picture entitled 'Brit Blazer' which lasted approximately one hour; that the general theme of the movie centered about the kidnapping of a female and her rescue by a female secret agent, Brit Blazer; that the feature contained several explicit scenes of nude males and nude females engaged in acts of fellatio, lesbianism and cunnilingus.

"Further affiant saith not."

Dec. 30, 1972

"Affiant says that the first feature he viewed was entitled 'Bells, Books and Balls' which lasted approximately one hour; that there was no general theme of the movie ascertainable by the affiant; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of group sex, sexual intercourse, lesbianism, fellatio and cunnilingus.

"Affiant says that he viewed the second feature entitled 'Mother Knows Best' which lasted approximately one hour; that the general theme of the movie centered about the sexual adventures of a mother and daughter traveling to the West Coast; that the film contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, lesbianism and cunnilingus.

"Further affiant saith not."

Jan. 10, 1973

"Affiant says that the first motion picture he viewed was entitled 'The Hedonist-Hypnotist' which lasted approximately one hour; that the general theme of the feature centered about the use of hypnosis to effectuate sexual relations; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus, and group sex.

"Affiant says that he viewed the second feature entitled 'Documentary of a Madam' which lasted approximately one hour; that the general theme of this feature centered about the activities of a brothel; and that the movie contained several explicit scenes of nude males and nude females engaged in acts of sexual intercourse, fellatio, cunnilingus and lesbianism.

"Further affiant saith not."

A copy of Point 3 of the trial brief and the four affidavits of Deputy Sheriff Hawk, referred to above, is reprinted in the Appendix at page N3-12.

On February 12, 1973, appellants herein filed three motions with detailed supporting memoranda in *Pursue, Ltd. v. Huffman*, 72 Civ 432, namely: 1. A Motion to Dismiss; 2. A Motion to Dissolve the Temporary Restraining Order, and 3. A Motion for Immediate Hearing. Copies of said motions and the supporting memoranda are reprinted in the Appendix at pages O3-16. In the memoranda which supported said motions, appellants herein pointed out to the federal court that the federal action, *Pursue Ltd. v. Huffman*, 72 Civ 432, was a sham pleading brought in bad faith, and that to permit further recognition thereof would only perpetuate the fraud and the resultant gross abuse of the federal judicial process already thrust upon the court. The memorandum in support of the Motion for Immediate Hearing states in part, as follows (See Appendix at page O-14):

"In support of defendants' allegations, defendants have attached to and incorporated by reference Exhibits A, B and C to their motions to dissolve temporary restraining order and to dismiss which are affidavits of persons who have seen the motion pictures exhibited by plaintiff at subject premises for three successive weeks, January 10-30, 1973, together with photographic reductions of time-motion studies of said motion picture films. Tape recordings have been made of said films and will be available at the hearing of defendants' Motions to Dissolve Temporary Restraining Order and to Dismiss. (A copy of the said time-motion studies are not attached to copies of said motions served upon counsel for plain-

tiff as only one copy is presently available; said time-motion studies are available to plaintiff's counsel in the Clerk's Office, having been previously filed herein).

"Plaintiff's continuous exhibition of obscene motion picture films and abuse of the federal judicial process to perpetuate a fraud upon this court is flagrant and without precedent. Unfortunately, this court has been placed in a position of making an order based upon a contention of great and immediate irreparable injury by plaintiff which has, as the attached exhibits demonstrate, resulted in great and immediate irreparable harm to the citizens of the State of Ohio, not the plaintiff . . . ."

A copy of the affidavits of the law enforcement officers which described to the court the nature of the subject matter being exhibited at the Cinema I Theatre, during the period January 10-30, 1973, and copies of the time-motion studies of said films, which accompanied said affidavits when they were filed with the three-judge Federal District Court on February 12, 1973, are reprinted in the Appendix at pages P2-39, Q2-41 and R3-51.

On February 12, 1973, appellants herein also filed a second motion for an immediate hearing with supporting memorandum on the motion to remand in *William H. Dakota v. Huffman, et al.*, 72 CIV 445, previously filed with the Court on December 18, 1972 (See Appendix at pages L17-21.) A copy of the second motion is reprinted in the Appendix at pages O17-21. On March 12, 1973, not having heard anything from the court on the two previous motions for immediate hearings on the motion to remand in *William H. Dakota v. Huffman, et al.* 72 CIV 445, appellants filed an additional memorandum. A copy of the March 12, 1973 memorandum is reprinted in the Appendix at pages O22-34.

The three-judge Federal District Court heard oral arguments on the temporary restraining order in *Pursue, Ltd. v. Huffman, et al.* 72 CIV 432, on March 12, 1973. A copy of the transcript of the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ

of Mandate or Prohibition, in *Huffman et al v. United States District Court for The Northern District of Ohio, Western Division*, No. 72-1613, on file with this Court (See Supra, at page 1, footnote 1). During such proceedings, the court defined the scope of the hearing as:

"THE CLERK: The matter before the Court this morning is *Pursue Ltd., et al versus Lawrence S. Huffman, et al.*, bearing Civil No. 72-432. Hearing on Temporary Restraining Order. Parties by counsel are present."

"THE COURT: The Court wishes to inform counsel that the only question before this three-Judge Court is the constitutionality of the so-called Ohio Nuisance Statute. . . ." (T, page 2, lines 8-11.)

and

". . . The question, as Judge Celebrezze pointed out is whether or not the Ohio Nuisance Statute, that is Ohio Revised Code 3767.01 and the following sections can be employed to close a theatre as a public nuisance . . . ." (T, page 2, lines 19-22.)

"THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that--well, the question before us is if that was a constitutional section there, we still would also reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T. page 19, lines 16-22.),

While the court indicated at the time that it was considering the constitutionality of the statute as it was being applied in the case, it arbitrarily and unreasonably refused to consider Appellant's motion to dismiss and evidence by way of affidavits on the trial court's finding of a public nuisance. See T. page 29, lines 3-20 and also the four affidavits of Deputy Sheriff Hawk filed with Point 3 of the trial brief and referred to herein at page 16.

On April 20, 1973, the court issued its opinion and order holding the closure portions of the Ohio Nuisance Statute, Sections 3767.04 and 3767.06, unconstitutional and enjoined the appellants herein from executing that portion of the Allen County Common Pleas Court final judgment of November

30, 1972, in *State of Ohio ex rel Huffman v. William H. Dakota, et al.*, 72 CIV 0326, which ordered the closing of the Cinema I Theatre at 69 Public Square, Lima, Ohio, "for a period of one year unless sooner released by order of Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio ...."(See Appendix at pages A3-12.)

A notice of appeal was filed in the United States Supreme Court on May 14, 1973.

On June 1, 1973, appellants petitioned this Court for a Writ of Mandate or Prohibition in *Huffman et al v. The United States District Court for The Northern District of Ohio, Western Division et al*, No. 72-1613, and also made application to Justice Potter Stewart for a stay order or writ of injunction, and an order to advance the date set for filing of briefs in opposition to the petition. On June 25, 1973, both matters were referred to and denied by the Court as a whole. *Huffman et al. v. U.S. District Court for The Northern District of Ohio et al.*, U.S. , 37L.Ed.2d 1039__ S.Ct. __ June 25, 1973.

The Jurisdictional Statement was filed on August 14, 1973.

COLLATERAL STATEMENT OF FACTS APPEARING IN PETITION FOR WRIT OF MANDATE IN *HUFFMAN ET AL. V. UNITED STATES DISTRICT COURT* IN THE UNITED STATES SUPREME COURT NO. 72-1613.

On April 26, 1973, the three-judge Federal District Court, sua sponte, filed an opinion and order dismissing *William Dakota et al. v. State of Ohio ex rel Lawrence S. Huffman*, 72 CIV 445 as being moot. A copy of said order is reprinted in Appendix at page S-3.

On May 24, 1973, Appellants filed a Notice of Appeal to the Court of Appeals, Sixth Circuit, and Motion to Stay Proceedings pending action by this Court, which Motion was granted on Nov. 2, 1973.

On May 1, 1973, appellants herein again sought judicial enforcement of the Ohio Statute in the Common Pleas Court in the civil action, *Ohio ex rel Huffman v. William Dakota, et al.*, 72 CIV 0326. On that date, appellants filed a motion in the Common Pleas Court to determine the obscenity of three motion picture films then being shown at the Cinema I Theatre: "Just Married", "Back Door", and "Bob Dick", which depicted numerous scenes of sexual intercourse, cunnilingus and fellatio; and the Common Pleas Court set May 3, 1973, as the hearing date on that motion. A subpoena duces tecum was issued and served on May 1, 1973, upon Robert Smith, known by the appellants to be the new manager of the Cinema I Theatre, and Projectionist John Doe. Copies of the motion, journal entry and subpoena duces tecum are reprinted in the Appendix at pages T3-6.

On May 3, 1973, before the scheduled hearing in the Common Pleas Court in *State ex rel Huffman v. Dakota*, 72 CIV 0326 had commenced, the defendants filed a second petition for removal in the Federal District Court, entitled *William H. Dakota v. State ex rel Huffman*, 73 CIV 176, ousting the Common Pleas Court of its jurisdiction in the matter. On May 14, 1973, appellants herein again returned to the Federal Court, this time in *William H. Dakota v. State ex rel Huffman*, 73 CIV 176, and filed a motion to remand with supporting memorandum and a motion for immediate hearing thereon, with supporting memorandum, including the affidavit of Deputy Sheriff Hawk as to the content of the three films. The motion for immediate hearing was overruled on May 22, 1973. Copies of the petition for removal and accompanying papers, and the motion for remand, affidavits, and accompanying papers are reprinted in the Appendix, pages U3-36.

Having been ousted of jurisdiction in the civil process by the petition for removal filed on May 3, 1973, appellant authorized criminal filings against the manager of the Cinema I Theatre, Robert Smith, in *State of Ohio v. Robert Smith*, 73 CR 093. On May 4, 1973, a summons was issued in lieu of an arrest warrant for Robert Smith, manager of the theatre, supported by a criminal affidavit. At the time of

filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court, supported by an affidavit of a policeman who had observed the motion picture films in issue, "Back Door", "Just Married" and "Bob Dick", who described in detail what he saw. The Common Pleas Court signed an order assigning the matter for a hearing on May 7, 1973. At the same time, a subpoena duces tecum was issued for the motion picture films in question, to be served upon Robert Smith, the manager, and Otis Hatfield, the projectionist. On the evening of May 7, 1973, Smith was served with copies of all of the abovementioned papers and Otis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers are reprinted in the Appendix at pages V3-12.

On May 7, 1973, before the scheduled hearing in the Common Pleas Court had commenced, the defendant in *State of Ohio v. Smith*, 73 CR 093, filed a petition for removal in the Federal District Court, entitled *Smith v. State of Ohio*, 73 C 180. On May 14, 1973, appellants herein again returned to the Federal District Court and filed a motion for remand with supporting memorandum, and a motion for immediate hearing with supporting memorandum. The motion for immediate hearing was overruled on May 22, 1973. Copies of the petition for removal in *Smith v. State of Ohio*, 73 C 180, and accompanying papers, and petitioners' motion to remand and accompanying papers are reprinted in the Appendix, at pages W3-29.

On May 8, 1973, petitioner again filed criminal charges, this time against both the manager and the theatre in *State of Ohio v. Smith*, 73 CR 098 and *State of Ohio v. Pursue, Ltd.* 73 CR 099.

On May 8, 1973, in *State of Ohio v. Smith*, 73 CR 098, a summons was issued in lieu of an arrest warrant for Robert Smith, as manager of the Cinema I Theatre, supported by a criminal affidavit. At the time of the filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court supported by an affidavit of a policeman who had observed the motion picture films at issue, "The Wedding" and "Sex And The Working Girl", who described in

detail what he saw. The Common Pleas Court by journal entry assigned the matter for a hearing on May 10, 1973, and a subpoena duces tecum was issued for the motion picture films in question. On the evening of May 8, 1973, Robert Smith was served with copies of all of the above papers and Otis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers are reprinted in Appendix at pages X3-12.

On May 8, 1973, in *State of Ohio v. Pursue, Ltd.*, 73 CR 099, a summons was issued in lieu of an arrest warrant supported by a criminal affidavit. At the time of the filing of the affidavit, a motion for prior adversary hearing was filed with the Common Pleas Court, supported by an affidavit of the policeman who had observed the motion picture films at issue, who described in detail what he saw. The Common Pleas Court, by journal entry, assigned the matter for a hearing on May 10, 1973, and a subpoena duces tecum was issued for the motion picture films in question. On the evening of May 8, 1973, manager Robert Smith was served with copies of all of the above papers as the agent of Pursue, Ltd., pursuant to Ohio Rules of Civil Procedure which were applicable as to the service of process upon a corporate defendant. Otis Hatfield, the projectionist, was served with a subpoena duces tecum only. Copies of the above papers are reprinted in the Appendix at pages Y3-11.

On May 10, 1973, a hearing was conducted in *State of Ohio v. Pursue, Ltd.*, 73 CR 099. Prior to the entry of a plea, Pursue, Ltd. moved to quash the service of summons and the court instructed counsel to submit briefs on that issue. On May 14, 1973, appellants herein filed a brief on behalf of the State of Ohio, a copy of which is reprinted in the Appendix at pages Y12-13.

On May 10, 1973, a hearing was conducted in the Allen County Common Pleas Court in *State of Ohio v. Smith* 73 CR 098, at which time both Smith and Hatfield refused to produce the films, named in the subpena duces tecum, pleading the Fifth Amendment. Thereupon, the State of Ohio presented independent evidence to show that Smith and Hatfield were, in fact, in possession of the described films at the time

of service of process. The Common Pleas Court held both in contempt and ordered them incarcerated for a period of ten days in the Allen County Jail, or for such lesser time as was necessary to make them produce the films, and on May 11, 1973, journalized the contempt citations against Smith and Hatfield in 73 CR 098, copies of which are reprinted in the Appendix, pages Z3-8.

On May 11, 1973, a petition for a writ of habeas corpus was filed in the Federal District Court on behalf of Smith and Hatfield in C 73-187. Upon the filing of the petition, the Federal District Court issued an order releasing Smith and Hatfield from the Allen County Jail, a copy of which order is reprinted in the Appendix at page Z9. On May 11, 1973, the order was served on the Sheriff of Allen County, who accordingly released Smith and Hatfield. On May 14, 1973, appellants herein were instructed by telephone by the Federal District Court of the content of the petition, the content of which appears in the Appendix at pages Z10-12, and that there would be a hearing on the petition for writ of habeas corpus at 2:00 P.M. on May 16, 1973.

On May 16, 1973, appellant Fair filed an answer in C 73-187 and "Memorandum In Support of Right of Law Enforcement to require the production of films alleged to be obscene," copies of which are reprinted in the Appendix at pages Z13-20.[2]

[2] On August 8, 1973, U. S. District Judge Nicholas Walinski filed an opinion and order granting the writ of habeas corpus as prayed for in Smith and Hatfield v. Fair, C73-187, and entered judgment thereon. On April 17, 1974, the U.S. Court of Appeals for the Sixth Circuit affirmed in Fair v. Smith and Hatfield, No. 73-2039 __F2 __, (Phillips, Edwards, McCree.) holding:

> "The Appeal from the issuance of a writ of habeas corpus having come on to be heard upon oral argument, and it appearing that the district court's determination that Appellees' obedience to the command of the subpoena duces tecum would violate his Fifth Amendment rights is correct, upon consideration, it is ordered that the judgment be, and it hereby is, affirmed.

A petition for writ of certionari to the Court of Appeals for the Sixth Circuit is being prepared for filing with this Court.

SUMMARY OF ARGUMENT

In alleging federal jurisdiction under the Civil Rights Act of 1871 (42 USC Section 1983 and 1985), Appellee has failed to state a cause of action. In *Griffin v. Breckenridge*, this Court recognized that Sections 1983 and 1985, having been enacted at the same time, must be read together and as a whole. If a Section 1985(3) "Conspiracy" requires racial or perhaps otherwise class based invidiously discriminatory animus then a 1983 action (conspiratorial or otherwise) must require the same animus. In any event, the legislative history, reviewed by this Court in *Griffin v. Breckenridge*, 403 U.S. 88 indicates that Congress in 1871 never intended the 1871 Act to be used as a vehicle for transforming a state public nuisance action to abate "obscenity" into a federal cause of action.

This Court's ruling on the cause of action in *Mitchum v. Foster* did not hold that 42 USC Section 1983 embraces a civil rights action of the sort pleaded there (based on a Florida obscenity public nuisance action). The *Mitchum* decision merely decided that the three-judge federal district court had erred in its prefatory ruling in the abstract that 42 USC Section 1983 was not an act of Congress within the "expressly authorized" exception to the anti-injunction statute.

If this Court holds that the complaint herein states a viable cause of action under 42 USC Section 1983, then this Court is inviting a recurrence of the same incredible log jam of federal interference cases which appeared on this Court's docket during the 1969-1972 terms of court. Further, justice will not be served thereby, for a prosecutor cannot properly discharge his governmental responsibilities in this area under the directorship of two judicial masters, whose rulings are, more often than not, in direct conflict with each other.

Even assuming that, in theory, a cause of action can be state under 42 USC Section 1983, based upon legal action

taken by a county prosecutor to abate a "place" and sexual conduct therein which amounts to a public nuisance, still the facts pleaded in *Pursue Ltd. v. Huffman*, C72-432, on their face, failed to establish such a cause of action and the District Court, for that reason alone, should have dismissed the case. The state legal action, which Pursue Ltd. sought to nullify, pleaded and established proof of a public nuisance based upon *specific* sexual conduct. In such a case, the federal complaint must also plead highly specific facts if federal jurisdiction is to be invoked. Where the allegations are broad, conclusory, and lack supporting factual allegations, as here, the complaint must be dismissed.

When the three-judge court, on March 12, 1973, heard Appellant's motion to dissolve the temporary restraining order and to dismiss the complaint (see Docket Entry for March 12, 1972 at Appendix page Z-27) it erroneously failed to consider: (1) Appellee's course of conduct from July 1972 through September 1972 as pleaded and proved in the state court trial (and alleged in the federal complaint); (2) Appellee's course of conduct from December 7 through January 10 (as presented through the affidavits of Deputy Sheriff Hawk, copies of which appear in the Appendix at Page N-9 through N-12), and (3) Appellee's course of conduct from January 10 through January 30 (as presented by affidavits and time-motion studies, copies of which appear in the Appendix at page 0-14 and Appendices P, Q and R). Construing the allegations of the complaint favorably to the Appellee, it still remains beyond doubt that under such allegations, Appellee could not prove a set of facts in support of his claim which would entitle him to relief. *Scheuer v. Rhodes* __ U.S. ___ (Apr 17, 1974).

Further, the pleadings demonstrated that this was a case which clearly called for an application of the rule of law expressed in *U.S. v. Raines*, 362 U.S. 17, which holds that one to whom application of a statute is constitutional will not be heard to attack the statute on the grounds that impliedly it might also be taken as applying to other persons and other

situations in which its application might be unconstitutional.

The Pursue Ltd. complaint failed to supply a basis for equitable jurisdiction and federal intervention under the rules established by this Court in *Younger v. Harris* 401 U.S. 37, *Samuels v. Mackell* 401 U.S. 66, and *Mitchum v. Foster* 407 U.S. 225. As a matter of law, Appellants could not be said to be acting in bad faith or for purposes of harassment where (1). the statute relied upon had been held to be constitutional in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574 (Mar. 10, 1970), and (2) the state trial court had upheld Appellants' claim of a public nuisance after trial on the merits both on the preliminary injunction on Oct. 24, 1972, and on the final injunction on Nov. 30, 1972. Further, a civil statute requiring a forfeiture for a period of one year of the leasehold interest in property used in conducting or maintaining a public nuisance is clearly constitutional, *U.S. v. U.S. Coin and Currency* 401 U.S. 715, *One Lot Emerald Cut Stones* and *One Ring v. U.S.*, 409 U.S. 232; *Astol Calero v. Pearson Yacht Leasing Co.*, ___U.S. ___ (May 15, 1974).

The three-judge court should have dismissed the case for failure to raise a substantial federal question. *Idlewild Bon Voyage Liquor, Corp. v. Epstein*, 370 U.S. 713; *Kingsley Book Inc. v. Brown*, 354 US 436.

That portion of the Pursue, Ltd. complaint which sought equitable relief should have been dismissed under the equitable maxim that "Equity will not be the abettor of iniquity." *McGrew et al v. City of Jackson, Mississippi* 307 F. Supp 754.

Further, the three-judge court should have dismissed the Pursue, Ltd. complaint as a sham pleading (i.e., good in form but false in fact and not pleaded in good faith), based upon the state court record and the uncontroverted affidavits of Appellee's course of conduct in December of 1972 and January of 1973. 61 Am Jur. 2d, Pleading, page 474. The hard-core nature of the films continuously being exhibited at the Cinema I Theatre demonstrated that the issue before the Court was one of law (obscenity per se) and not one of fact. To permit Appellee to commercially exploit sex under

the pretense of freedom of expression worked an injustice on the People of the State of Ohio and constituted an abuse of the federal court process.

Under the doctrine of *lis pendens*, Pursue, Ltd. lacked standing to prosecute a civil rights action. O.R.C. section 2703.26; 34 Ohio Juris. 2d. 684. On November 17, 1972, the date that Pursue, Ltd. acquired from William Dakota its leasehold interest in Cinema I a civil proceedings *in rem* to determine the status of property at that address was on file in The Allen County Common Pleas Court and all parties in that action had been served. The complaint described by metes and bounds and by street address said premises and named the owner thereof. Actual notice of such state lawsuit was given to Pursue, Ltd. on November 22, 1972, through service on Robert Hollis, the president of Pursue, Ltd. Finally, Pursue, Ltd. had actual knowledge of the final judgment of November 30, 1972, in the state court action (forfeiting the leasehold interest for a period of a year of William Dakota, Pursue, Ltd.'s assignor) prior to its filing of the federal action, having alleged that fact in its complaint. Under the doctrine of *lis pendens*, the final judgment of the Allen County Common Pleas Court in *Ohio ex rel Huffman v. William Dakota*, 72 CIV 0326 on November 30, 1972, forfeiting the leasehold interest of William Dakota, operated to divest Pursue, Ltd. of such interest in the property.

Under the mandatory provisions of 28 USC Section 2283, the United States District Court lacked jurisdiction to enjoin the proceedings in the state court inasmuch as the real estate which was the subject of the action was *in custodia lex* in the state court proceedings. *Toucey v. New York Life Insurance Co.*, 314 US 118. Under the *"in rem"* exception, not only may the federal court not interfere, but the contrary is true, namely, that, the state court, having jurisdiction over the *res*, has the authority to restrain any *federal* court proceedings which interfered with the *state* court proceedings. *Donovan v. Dallas*, 377 US 408.

Since the federal court lacked jurisdiction over the state court action and the real estate, its order enjoining Appellants Huffman and Fair from executing the Allen County Common Pleas Court judgment of November 30, 1972, was unauthorized and invalid. *Donovan v. Dallas*, 377 US 408 at 413.

A federal court has no power to interfere with state appellate proceedings. It may not, in any event, stay proceedings in a state court after a final judgment has been entered in the state court action. Compare the dissent of Justice Douglas in *Byrne v. Karalexis*, 396 US 976, 24 L.Ed.2d 447 at 486.

The removal of the state court action in *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, filed on December 11, 1972, was improper and the cause should have been remanded. The federal removal statutes do not authorize the removal of a state cause of action to abate a public nuisance. 28 USC Section 1441(b) does not authorize the removal of a state action where the First Amendment claim does not appear on the face of the state complaint and is raised as a defense. *Gully v. First National Bank*, 299 US 109. 28 USC Section 1443 (1) authorized the removal of a "civil rights" action *only* where the claim is stated in terms of racial equality. *Georgia v. Rachel*, 384 US 780. In any event, the removal statutes do not authorize the *untimely* removal of a state court action which has already proceeded to final judgment. 28 USC Section 1446 (b).

The Ohio Obscenity Statutes, as construed by the Ohio judiciary and as applied by the trial judge meets the "specificity" requirements enunciated by this Court in *Miller v. California*, 413 US 15. The Ohio judiciary, through decisional law, has for the past five years engrafted specific standards onto the term "obscene" as used in the Ohio Obscenity Law. Further, Ohio Revised Code Section 2905.34, which was effective at the time the state abatement action was tried in the Allen County Common Pleas Court, provided specific standards of the type enunciated by this Court in *Miller v. California, supra, Ohio ex rel Ewing v. "Without A Stitch"* 37 Ohio St. 295.

The federal court below, in riveting its attention to the prior restraint and *"in personam"* implications of *Near v. Minnesota* completely lost sight of the fact that the Ohio Legislature had undertaken to provide what unquestionably

is an *"in rem"* and not an *"in personam"* remedy. The error in the logic of the federal district court opinion is the result of faulty deductive reasoning which proceeded somewhat as follows: *Major premise:* To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under *Near v. Minnesota*. *Minor premise:* The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films.

Conclusion: The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) is unconstitutional. The court should have reasoned as follows: *Major premise:* Under the ancient doctrine of deodand expressed in *U.S. v. U. S. Coin and Currency* 401 U.S. 715 and *One Lot of Emerald cut Stone and One Ring v. U.S.* 409 U.S. 232, where a place is determined in a legal proceedings to be operating as a public nuisance involving countraband, a penality may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period up to one year. *Minor premise:* The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films through forfeiture of the leasehold interest (use of the premises) as a penalty.

Conclusion: The Ohio Public Nuisance Statute (Ohio Revised Code Sections 3767.04 and 3767.06) is constitutional. "Legal Reasoning and Briefing" by Brumbaugh at page 56.

A state court is not limited to criminal prosecution as the only weapon in the armor of law but may use a *qui tam* action, injunction, or a combination of the three. Further, the laws of deodand may be utilized. *Kingsley Book, Inc. v. Brown*, 354 US 436. There can be little doubt that a prosecuting attorney can state a civil cause of action to abate a piece of real property as a public nuisance based

upon a succession of successful criminal convictions for morals offenses of the same nature occurring at that location. Upon a finding that such public nuisance was continuing and presently existed, an Equity court could order the place closed as a public nuisance or lay down the conditions upon which the activity could remain in operation. The same result can also be reached by alleging and proving in a single trial (as was done in the State action herein) a course of continuing conduct, by establishing in evidence the series of separate criminal acts which were referred to in the first hypothetical.

The Public Nusiance Law of Ohio is based upon the widely-used Red Light Abatement Act, enacted by most of the states over 50 years ago, to compensate for certain inadequacies of the criminal law, regarding prostitution. That legislative device, which provide for the abatement of public nuisances and establish forfeitures, was aimed at "lewdness" of a different type. The historical development of this type of statute has proceeded in three directions: (1) Some states like Missouri use language which is clearly limited to houses of prostitution; (2) other states, like California, have used statutory language like "prostitution, assignation, and lewdness" in which, by judicial decision, the term "lewdness" has been given a broad meaning: (3) other states, such as the State of Ohio and Louisiana have adopted amendments which specifically include places where obscenity is exhibited.

The Ohio statutory language defining "nuisance" specifically encompasses a place where obscene films are exhibited. Its constitutionality as applied to the film "I Am Curious Yellow" was challenged in the federal system and upheld in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574 (Mar. 10, 1970), vacated and remanded for further consideration in light of *Miller v. California* in *Grove Press, Inc. v. Flask*, ___ US ___, 37 L.Ed.2d 613, ___S.Ct.___(June 15, 1973). The Ohio Supreme Court has also upheld its constitutionality as applied to the motion picture film "Without A Stitch" in *State of Ohio ex rel Ewing v. "Without A Stitch"*, 37 O. St.2d

95, 307 N.E.2d 911 (Feb. 27, 1974):

The exhibition of one obscene motion picture film alone may provide a proper basis for a judicial closing of a theater for a year as a public nuisance. If the film is grossly obscene (for example, "Deep Throat") and has been playing for a substantial period of time, that fact alone can provide the basis for a padlock order. Upon other facts, the result may be otherwise, such as where the single exhibition was not so gross and was not representative of the exhibitor's course of conduct as customarily experienced, or such picture was "pulled" by a responsible exhibitor so that it reasonably could be found by the trial court that the public nuisance had been abated and no longer existed.

The plain language of Ohio Revised Code Sections 3767.04 and 3767.06 shows it to be entirely constitutional. Further, the constitutionality of those sections has been explicated by the recent interpretations given to them by the Ohio Supreme Court in *Ohio ex rel Ewing v. "Without A Stitch", supra.*

The contrary construction given Section 3767 by the three-judge court below failed to take into consideration the fact that Ohio Revised Code Sections 3767 et seq. is a statute involving the public welfare, as to which Ohio courts were entitled to apply a liberal construction in favor of the public. 50 Ohio Juris. 2d. at 226. A three-judge federal district court in the Southern District of Ohio, Western Division (Peck, Porter and Hogan) reached an opposite conclusion in *Cincinnati Properties Inc. v. Leis* ____ *F.* Supp.___(May 2, 1974), holding "The padlocking provision of the Ohio Statute is a time honored remedy involving the place - it is not censorship or prior restraint."

The law expressed by this Court in *Steffel v. Thompson* has the practical effect of repudiating this Court's policy, recently expressed in *Younger v. Harris* of limiting federal interference in state court law enforcement actions. *Steffel* however, may not be applied to obscenity litigation because of the rule of law formulated in *Miller v. California*, which holds that the states are to be the first to define what specific sexual conduct is to be proscribed under state law.

ARGUMENT

I

PURSUE LTD. HAS FAILED TO STATE A CAUSE OF ACTION AS TO WHICH A FEDERAL COURT HAS ORIGINAL JURISDICTION

(A) THE CONGRESSIONAL PURPOSE IN PASSING THE CIVIL RIGHTS ACT OF 1871 (42 USC SECT. 1983 AND 1985) WAS TO PREVENT RACIAL DISCRIMINATION. IT WAS THE INTENT OF CONGRESS AT THAT TIME THAT THOSE SECTIONS SHOULD NOT BE INTERPRETED AS A GENERAL FEDERAL TORT LAW AUTHORIZING INTERFERENCE WITH WHAT TRADITIONALLY, ARE MATTERS FOR THE STATE COURTS. A PUBLIC NUISANCE LAWSUIT, BROUGHT BY A COUNTY PROSECUTOR, IS A CLASSIC EXAMPLE OF A LAWSUIT BELONGING TO THE LATTER GENRE OF CASES.

The jurisdictional grounds upon which Pursue, Ltd. relies in bringing this Federal lawsuit is the Civil Rights Act of 1871. Appellee's original complaint alleged a cause of action under 42 U.S.C. Section 1983 (See Appendix at page J-5), and an amendment to the complaint, filed on December 29, 1972, added 42 U.S.C. section 1985(3) as an additional jurisdictional grounds for the lawsuit (See Appendix at page M-4). Appellants submit that the legislative history (recently reviewed by this Court in *Griffin v. Breckenridge*, 403 U.S. 88, 29 L.Ed.2 338, 91 S.Ct. 1790 (June 7, 1971) surrounding the 1871 enactment, indicates that Congress in 1871 never intended the 1871 Civil Rights Act should be made a vehicle for converting the Federal District Court into a trial court for every case in which a pornographer raises a "free speech" defense in a state court.

On the issue of whether Pursue Ltd. stated a cause of action under 42 USC Sect. 1985(3) (see Appendix at page M-4), court cannot avoid the implications of its rationale in

Griffen v. Breckenridge, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790 (June 7, 1971) where, in upholding federal jurisdiction under the conspiracy section of the Civil Rights Act of 1871, in the case of conspiracies of private individuals to deprive the plaintiffs of civil rights involving racial discrimination, (43 USC Sect. 1985) Justice Stewart was required to examine the congressional purpose behind such legislation and concluded that *it was never the intent of Congress that the act should include conspiracies other than those showing some racial or perhaps otherwise class-based invidious discriminatory animus behind the conspirators' actions, at page 348:*

> "It is thus evident that all indicators - text, companion provisions, the legislative history - point unwaveringly to 1985 (3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, *they were equally emphatic that they did not believe, in the words of Representative Cook, 'that Congress has a right to punish an assault and battery when committed by two or more persons within a State.'* Id. at 485. The constitutional shoals that would lie in the path of interpreting § 1985 (3) as a general federal tort law can be avoided by giving full effect to the congressional purpose - *by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.* See the remarks of Representatives Willard and Shellabarger, quoted supra, at 100,29 L.Ed.2d, at 347. The language requiring intent to deprive of equal protection, or equal privileges and immunities, *means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action.* The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." (Our emphasis)

Stewart grounded the 1971 decision upon three factors: (1) the plain language of 42 USC Sect. 1985; (2) *the statutory scheme of the 1871 Civil Rights Act, taken as a whole (42 USC Sect. 1983 and 1985) and (3) the legislative history of the Civil Rights legislation in 1871.* In examining the plain language of Section 1985, Stewart noted the failure to include the same phrase "under color of law," used in Section 1983, and remarked at page 345:

> "Indeed, the failure to mention any such requisite can be viewed as an important indication of Congressional intent to speak in Section 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the law,' whatever the source."

Analysing the statute further, he examined the Civil Rights legislation *as a whole* (Sections 1983 and 1985) and noted at page 346:

> "An element of the cause of action established by the first section, now 42 USC Sect. 1983, is that the deprivation complained of must have been inflicted under color of state law. *To read any such requirement into section 1985(3) would thus deprive that section of all independent effect. . . .Given the existence of these three provsions, it is almost impossible to believe that Congress intended, in the dissimilar language of that portion of section 1985(3) now before us, simply to duplicate the coverage of one or more of them..."* (our emphasis)

Since Sections 1985 and 1983 were enacted together as part of an integrated statutory scheme and must be read together, and if it was never the intent of Section 1985 to reach other than "racial, or perhaps otherwise class based, invidious discriminatory animus", then certainly the reach of Section 1983 is no broader and certainly does not justify making the federal district courts a trial court forum to litigate public nuisance lawsuits, lacking in racial or class based invidious discriminatory animus, wherein, as here a frivolous *defense* of "free speech" is patent on the face of the complaint. The broad language of Justice Brennan's

opinion in *Steffel v. Thompson*[3] ___U.S.___, 39L.Ed2d 505,__ S.Ct__ at pages 517 and 518 (March 19, 1971), with its emphasis on "the great impulse of national feeling born of the Civil War", cannot logically be read to authorize the type of federal interference indulged in herein by the U.S. District Court for the Northern District of Ohio under the guise of an 1871 "Civil Rights Action". To so hold would abnegate powers flowing from the Bill of Rights and Tenth Amendment which reserve *to the States* "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . ."

This Court's ruling in *Mitchum v. Foster, supra*, does not

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[3]The inundation of obscenity cases involving federal interference which this court witnessed during the 1969-1972 Terms of Court (which provided, in part, the motivating force for this Court's decision in Atlantic Coast Inc. R. Co. v. Engineers 398 U.S. 281, 26 L.Ed.2d 234, 90 S. Ct. 1739 (June 8, 1970) and Younger v. Harris 401 U.S. 37, 27 L.Ed.2d 669, 91 S. Ct. 746 (February 23, 1971)) is certain to reappear as defense attorneys seek haven in the shelter provided by this Court's decision in Steffel V. Thompson. Appellants submit that a prosecutor cannot properly discharge his governmental responsibilities under the directorship of two judicial masters, one of which tells him an exparte search warrant is proper (Ohio v. Boyd) 35 Ohio App. 2d 147, 300 N.E. 2d 752 (December 18, 1972). Motion for leave to appeal denied by the Ohio Supreme Court on December 15, 1973, petition for certiorari pending in this Court in Boyd v. Ohio No. 73-1339), another which tells him an exparte search warrant is unlawful but a subpoena duces tecum will serve the same purpose (see Boyd v. Huffman No. 70-296, and the letter of Federal District Judge Don J. Young reprinted at Appendix B-1 thru B-6 inBrief in Opposition to Boyd v. Ohio No. 73-1339, supra)and a third of equal rank with Judge Young on the federal tribunal which tells him that the use of a subpoena duces tecum runs afoul of the fifth amendment. See Smith v. Fair and Huffman ___F2 __(April 17, 1974) petition for certiorari being prepared for filing in this Court. Particularly is this so, when it is not unreasonable to expect the basic issue may not be resolved by this Court for four years from the time it is an issue in the trial court. Compare the legal surgery performed by the California Court of Appeals in Bloom v. Municipal Court 111 Cal. Rptr. 253 at 259fn F4 (Dec. 19, 1973) and the very practical solution there proposed, which would require any collateral attack to be accomplished thru prerogative writs. Should not federal jurisdiction be foreclosed in "public nuisance" in rem actions, except as extraordinary relief might appear in the offing thru use of the prerogative writs?

hold that 42 U.S.C. Sect. 1983 embraces a civil rights action of the sort pleaded herein, i.e., against state officials for state action taken to abate as a public nuisance a business dealing in obscenity as a regular course of conduct. All that case decided was that the three-judge court below erred in its prefatory ruling in the abstract that the injunctive relief sought was unavailable since 42 U.S.C. Sect. 1983, under which that lawsuit was brought, was not an Act of Congress within the "expressly authorized" exception of the anti-injunction statute which would authorize a federal court to grant injunctive relief and stay proceedings in a state court.[4] Nor did this Court consider in *Mitchum, supra*, whether the plaintiff in that action, did, in fact, state a cause of action under 42 U.S.C. Sect. 1983. See *Farrell v. Joel, Jr.*, 437 F.2d 160 (2nd Circuit, January 20, 1971), a civil rights case based upon 42 U.S.C. Sect. 1983 to review school administration practice, where Circuit Judge Feinberg, speaking for the 2nd Circuit (Lumbard, Feinberg, Clarie) noted at page 162:

> "Appellant assumes that his complaint states a viable action under the Civil Rights Act. 42 U.S.C. Sect. 1983, and its jurisdictional counterpart 28 U.S.C. Sect. 1343(3). *It is a measure of the change in the law over the past decade that the defendants and the district court did not question this assumption* . . . ." (Our emphasis.)

When this Court does undertake to decide this basic question, it must weigh in the balance this Court's past difficulties with federal interference in the obscenity and other areas of traditional state court activity during the past three terms of court, which culminated in its rulings restricting federal interference in *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 288, 26 L.Ed.2d 234, 90 S.Ct. 1739 (June 8, 1970), during the 1969 October Term and in *Younger v. Harris, supra; Samuels v. Mackell, supra; Boyle v. Landry, supra; Perez v. Ledesma, supra; Dyson v. Stein, supra; and Byrne v. Karalexis, supra*, during the 1970 October Term. It would be a tragedy were this Court to forget the incredible logjam which such federal interference has caused to this court's docket in the past.

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[4]See footnote 7 at page 39.

Appellants herein submit that any expansion of federal jurisdiction along the lines undertaken by the United States District Court for the Northern District of Ohio, Western Division, herein, will bring further chaos to obscenity litigation, will severely damage the state-federal court balance, and will further load this Court's docket.

(B) ASSUMING THAT, IN THEORY, A CAUSE OF ACTION CAN BE STATED UNDER 42 U.S.C. SECT. 1983 OF THE CIVIL RIGHTS ACT, BASED UPON LEGAL ACTION TAKEN BY A COUNTY PROSECUTOR TO ABATE A PLACE AND CONDUCT WHICH AMOUNTS TO A PUBLIC NUISANCE, STILL THE FACTS ALLEGED IN *PURSUE, LTD. v HUFFMAN*, C72-432, ON THEIR FACE, FAIL TO PLEAD SUCH A CAUSE OF ACTION AND FOR THAT REASON ALONE THE DISTRICT COURT SHOULD HAVE DISMISSED THE CASE.

(1) Appellee's Civil Rights Complaint in the Federal Court Failed to Allege The Highly Specific Facts Necessary to Defeat Appellants' Motion to Dismiss.

Appellant pleaded specific violations of specific state standards in the nuisance abatement action in the state trial court. Paragraph 10 of the Complaint in the State Court read as follows (See Appendix at pages C10-13):

"10. That the exhibition of said motion picture films at the Cinema I hereinabove alleged constitutes a public nuisance as that term is defined in Section 3767.01 (C) of the Ohio Revised Code, which reads in part as follows:

"Section 3767.01 Definitions

As used in all sections of the Revised Code relating to nuisances:

(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness . . . is conducted, permitted, continued, or exists,

or any place, in or upon which . . . obscene films . . . are screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public or the visual depiction of sex acts in public, whether real or simulated, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Ohio as expressed by the State Legislature in enacting Sections 2905.01, 2905.03, 2905.08, 2905.19, 2905.30, 2905.31, 2905.35, 2905.44, and other Sections in the Ohio Revised Code.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Ohio regulating public displays of such sexual activity, and that reproduction on the motion picture screen in public in two-dimensional form, in the matter indicated, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies hereinbefore referred to as Appendices A – F.

APPENDIX A. "Wow, It's Cindy" and "Hot Spurs". Lesbianism depicted on pages 1, 4 and 5; cunnilingus depicted on pages 1 and 6; sexual intercourse depicted on pages 1, 2, 6 and 8; auto eroticism depicted on page 3; group sex depicted on pages 4, 5 and 7; fellatio depicted on pages 6 and 8.

APPENDIX B. "Prostitution, Pornography U.S.A." and "Oddly Coupled". Masturbation depicted on page 2; sexual intercourse depicted on pages 2, 3, 5, 7 and 16; fellatio depicted on pages 3, 6 and 10; anal sodomy depicted on page 5; sexual sadism depicted on pages 5 and 6; lesbianism depicted on pages 11 and 12; cunnilingus depicted on page 15; group sex depicted on pages 20 and 21.

APPENDIX C. "Sandra, The Making of a Woman" and "Diamond Stud". Sexual intercourse depicted on pages 3, 6, 15 and 22; auto eroticism depicted on pages 5 and 6; cunnilingus depicted on on pages 7, 8, 14 and 21; lesbianism depicted on page 9; rape depicted on pages 10, 11 and 14.

APPENDIX D. "Midnight Plowboy" and "Tobacco Roody". Lesbianism depicted on page 8; sexual intercourse depicted on pages 8, 9, 10, 17, 18, and 20; cunnilingus depicted on page 14; fellatio depicted on page 28.

APPENDIX E. "The Blue Hour" and "The Grabbers". Lesbianism depicted on pages 7 and 8; sexual intercourse depicted on pages 7 and 13; auto eroticism depicted on page 12; group rape depicted on pages 12 and 13.

APPENDIX F. "The Exotic Dreams of Casanova" and "Sweet Georgia". Sexual intercourse depicted on pages 1, 2, 8, 9, 15, 16, 21, 22, 23 and 24; masochism depicted on page 4; auto eroticism depicted on pages 14 and 24; lesbianism depicted on pages 19 and 20.

Common sense dictates that in a case such as this, where the state court complaint is highly specific as to the nature of the conduct complained against, that a federal complaint alleging violations of sections 1983 and 1985 must reply to the questioned conduct with equal specificity, in order to avoid a motion to dismiss. In Federal Civil Rights Act by C. J. Antieau, Section 83 at page 108, the above principle is stated as:

> "It is often said that in an action under Section 1983, the plaintiff must allege highly specific facts. It is not enough to state conclusory allegations without support of the facts alleged. Complaints have been dismissed where the allegations were broad, conclusory and unsupported by factual allegations. *Weyandt v. Mason's Stores, Inc.*, (1968, D.C. Pa) 279 F. Supp. 283; *Sinchak v. Parente* (1966, D.C. Pa) 262 F. Supp. 79; *Pugliano v. Staziak* (1964 D.C. Pa) 231 F. Supp. 347, aff'd (CA3) 345 F2 797; *Negrich v. Hohn* (1967, CA3 Pa3) 379 F2 213 *Finley v. Rittenhouse* (1969, CA9 Cal) 416 F2 1186."

The federal district court did not have before it the same factual situation which faced the three judge court in *Scheuer v. Rhodes* ___ US ___, 40 L.Ed.2d. 90, 94 S.Ct. ___ (April 17, 1974) where this Court, in reversing the dismissal of a civil rights action under 42 USC sect. 1983, had occasion to hold at 104:

> "This case in its present posture. . .because of the absence of a factual record, does (not) permit a determination as to the applicability of the foregoing principles

to the respondents here. The District Court acted before an answer was filed and without any evidence other than the copies of the proclamations issued by Respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the Court from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. . .

"The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaint places directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint."

(2) The Federal District Court Erred In Failing to Take Into Consideration Appellee's Course of Conduct which was Alleged (and Proved in the State Court Trial).

In its ruling as to whether a cause of action had been stated in the first instance, the federal district court erred in failing to consider the facts as alleged by Pursue Ltd., that is, the trial court's examination of appellee's course of conduct extending over several months, and its examination of 16 motion picture films which had been exhibited at the theatre during that period of time, which films such court ruled were obscene under specific state standards as to what the term "obscene" legally encompassed.[5]

The test to be applied, in judging the sufficiency of a complaint under 28 U.S.C. section 1983, was reviewed by this Court in *Scheuer v. Rhodes, supra*, at page 96:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
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> '(I)n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45 (1957) (footnote omitted).
>
> See also *Gardner v. Toilet Goods Assn. Inc.*, 387 U.S. 167, 172 (1967)."

[5] See factual allegations in Pursue Ltd. Complaint, at paras. 14-18 (Appendix at pages J8-9).

Construing the allegations of the complaint favorably to the Appellee, it still remains beyond doubt that under the allegations, Appellee could not prove a set of facts in support of his claim which would entitle him to relief.[6]

Paralleling the legal consideration as to whether a three-judge court should have been impaneled and the concomitant jurisdictional requirement that a substantial federal question be raised as to the constitutionality of the State Statute, in the first instance, *(Idlewild Bon Voyage Liquor v. Epstein* 370 U.S. 713, 8LEd.2d. 794, 796, 82 S. Ct. 1294 (June 25, 1962), (infra, at page 42), is the legal question for the trial court as to whether the constitutional question posed has application to the situation under litigation. In other words, a court will not litigate legal rights in the abstract. *United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (Feb. 29, 1960). The *Raines* case concerned an action by the United States against members of the Board of Registrars and others of Terrell County, Georgia, under the Civil Rights Act of 1957, 42 U.S.C., § 1971. The United States District Court held 42 U.S.C. § 1971 (c) unconstitutional and dismissed the complaint. In reversing that court, the Supreme Court (Justice Brennan speaking for seven members, Frankfurter and Harlan concurring) held at page 529 that this Court, as is the case with all federal courts:

> ". . . 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of the litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never

[6] Further, that which was obvious under the pleadings was borne out by the subsequent failure of Pursue Ltd. to produce such evidence at the hearing on the motion to dissolve the temporary restraining order and to dismiss. (Appendix at pages O-3 and Z-27). When a pleader fails in such proofs, the Court should dismiss the Complaint. See Federal Civil Rights Acts by C. J. Antieau, at page 110.

to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied . . . .' Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional . . . ."

Out of respect for the police powers reserved to the people in the Bill of Rights, the federal district court had the duty and obligation, under such circumstances to refrain from formulation of a rule of constitutional law broader than was required by the precise facts to which it is applied. *United States v. Raines*, supra.

II

(A) THE COMPLAINT HEREIN FAILED TO SUPPLY A BASIS FOR EQUITABLE JURISDICTION AND FEDERAL INTERVENTION.

(1.) The Jurisdictional Requirement of *Younger v. Harris*, and *Mitchum v. Foster*, have not been met.

The equitable principles which govern interference by federal courts in criminal and civil proceedings pending in state courts were laid down by this Court in *Younger v. Harris*, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (Feb. 23, 1971), and *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (June 19, 1972).

In *Younger v. Harris, supra*, this Court established the equitable principles which are to govern interference by federal courts in pending *criminal* matters. There it was held that it would take "exceptional circumstances" to warrant a federal court's enjoining state proceedings where a state prosecution was already pending at the time the federal action was filed; that in general, the plaintiff *must allege and prove* not only "irreparable injury," the traditional prerequisite for injunctive relief, but in addition, that the danger

of irreparable injury is both "great and immediate," which normally requires that plaintiff show bad faith and an intention to harrass on the part of the prosecuting officials, as was established by the pleadings in *Dombrowski v. Pfister*, *380* U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); further, that where the prosecution is undertaken in good faith, and not for purposes of harrassment, a federal court may not properly enjoin enforcement of a statute solely on the basis of a showing that the statute "on its face" abridged First Amendment rights, absent "extraordinary circumstances." In *Samuels v. Mackell*, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764 (Feb. 23, 1971), those same standards were adopted where the federal relief sought in such situations was the issuance of a declaratory judgment.

In *Mitchum v. Foster, supra*, this Court was faced with a fact situation involving abatement proceedings brought under the civil law, - similar to the proceedings herein. While that decision dealt with a collateral issue,[7] the majority opinion did

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[7]Appellants seriously question the rationale and correctness of this Court's decision in Mitchum v. Foster that the century old Civil Rights Act of 1871 (42 U.S.C. section 1983), with the broad reach given to it by this Modern Court, comes within the "expressly authorized" exemption of the 1948 anti-injunction statute (28 U.S.C. section 2283). The continuing refusal of this Court to so hold in the face of repeated challenges up to and including Younger v. Harris, 401 U.S. 37, 27 L.Ed. 2d 669, 91 S.Ct. 746 (Feb. 23, 1971), and its companion cases, indicates that the answer was not as easily reached as the unanimous court in the Mitchum opinion suggests. See the concurring opinions of Justices Harlan and Stewart in Younger, supra, at 681.

While the Mitchum rationale states, at page 714, that the "relevant criteria" for making that determination are three in number, the language is deceptive in that only one real criterion is stated positively, namely:

> "Whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given the intended scope only by the stay of a state court proceeding. . . (our emphasis.)

The difficulty this test presents is brought into focus by asking the searching question - just how "clear" is the federal right; i.e., how broad is the reach of section 1983? Is it to be limited to racial bias and invidious discrimination, or does it extend across the board to public nuisance litigation? Compare Griffin v. Breckinridge, 403 U.S. 88, 29 L.Ed.2d 338, at 348, 91 S.Ct. 1790 (June 7, 1971), supra, at page 27 et seq.

observe that the above equitable principles regulating interference in criminal cases expressed in *Younger, supra*, also re-

Two of Mitchum's three "criteria" are negatives which prescribe no real criteria. To state that the federal law "need not contain an express reference to section 2283" or "need not expressly authorize an injunction of a state court proceeding" is but to state in a negative manner the obvious and orthodox interpretation that the "expression" can and should be found to be embodied in the language of the statute as written by Congress.

The Mitchum Court discusses two classes of clearly distinguishable exceptions to 28 U.S.C. section 2283, namely: 1) those embodied in the Acts of Congress and found in the language of the statute (p. 712 fn. 11-17) and, 2) those "implied" exceptions, not to be found in the statutory language, but grafted onto the statute by this Court prior to 1948, out of some form of necessity (p. 713 fn. 18-20). Appellants' criticism is that the Mitchum decision does nothing less than demonstrate that the "expressly authorized" exception of the 1948 version of 28 U.S.C. section 2283 can be established by the latter class as well as the former, which is exactly what this Court, in Atlantic Coast Line RR v. Engineers, 398 U.S. 281, 26 L.Ed.2d 234, 90 S.Ct. 1739, said could not be done to the 1948 statute – which holding, the language of Mitchum v. Foster, supra, at 711 also claims to reaffirm! It is one thing to read an "express authorization" from the four corners statutory language of the Act of Congress (see fn. 11-17). It is quite another thing to find such expression lacking in the century old statutory language, and to imply the same by resort to the ancient history and debates of its congressional authors, who, today, would be unable to recognize that statute as broadly interpreted by this Modern Court. 28 U.S.C. section 2283, enacted in 1948, does not allow injunctions where "impliedly" authorized by Congress. It does, however, allow injunctions where "expressly" authorized by Congress. See Barnes v. City of Danville, 337 F2 579:

> "Statutory exceptions are not so easily found from a Congressional enactment of such vintage. Unless the later statute contains, or carries with it, strong evidence to repeal the earlier, or to carve out an exception from it, a court's duty is to harmonize the two."

Smith v. Village of Lansing, 7 Cir. 1957, 241 F2 856; Vojcik v. Palmer, 7 Cir. 1963, 318 F2 171; Sexton v. Barry, 6 Cir. 1956, 233 F2 220; Brooks v. Bailey, M.D. Tenn. 1967, 274 F. Supp. 538, aff'd. 391 U.S. 361; Cameron v. Johnson, S.D. Miss. 1966, 262 F. Supp. 873 aff'd. 390 U.S. 611 (1968); and Rage Books Inc. v. Leary, S.D. N.Y. 1969, 301 F. Supp. 546.

Should not the Mitchum Court have followed the rule of law applied under Justice Black's leadership in Younger, namely: never to decide a narrow constitutional issue (whether 42 U.S.C. section 1983 is an "expressly authorized" exception to the anti-injunction statute), when the matter could be disposed of on a broader constitutional grounds (applying the judicial rule that under the circumstances presented in the record this Court will not allow such injunctive powers to be broadly exercised, even though granted by Congress.)

strained interference by a federal court in civil cases pending in state courts, at page 718.

> ". . . we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in Younger v. Harris . . . ."

The facts as pleaded in the complaint show: (1) That the statute under which the civil action was brought had been upheld, *pro tanto*, against a broad attack on the statute, by a three-judge Federal District Court in the same district wherein the federal relief was sought, *Grove Press, Inc. v. Flask*, 326 F. Supp 574 (Mar. 10, 1970), vacated and remanded on other grounds in *Grove Press, Inc. v. Flask* 414 US__, 37 L.Ed.2 1013, 93 S.Ct.__ (June 21, 1973) and (2) that the civil action was brought by petitioner as the prosecuting attorney for Allen County under the compulsion of O.R.C. Section 3767.03, and (3) that the judgments of the state trial court on the issue of "public nuisance" were favorable to the petitioner in the hearings on both the preliminary injunction, entered October 24, 1972, and on the final injunction, entered November 30, 1972, both of which determinations were alleged on the face of the complaint. Appellants submit that a finding that the pleadings herein raised issues of "bad faith" and "harrassment" would be reversible error.

The inescapable conclusion to be drawn from the principles expressed in *Younger and Mitchum* and the facts stated in the complaint on file herein is that a case for federal relief by way of equitable interference has not been stated by Appellees. Where, as noted above, it must be held as a matter of law that petitioners acted in good faith and not for purposes of harrassment, a case for federal relief based upon "danger of irreparable injury being great and immediate" is unavailable.

Nor can appellee claim a case for federal relief on the alternative grounds that (1) the statute on its face abridges First Amendment rights, and (2) that "extraordinary circumstances" exist; for neither of the latter two elements of proof

exist. An examination of O.R.C. Section 3767 et seq show it to be constitutional on its face. *Grove Press, Inc. v. Flask, supra,* Further, a civil statute requiring a forfeiture for a period of one year of the leasehold interest in the property used in conducting or maintaining a public nuisance, as a civil penalty, after trial on the merits and a finding by the trial court that a public nusiance exists, is entirely constitutional. *U.S. v. U.S. Coin and Currency. One Lot of Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232, 34 L.Ed.2d 438, 93 S.Ct. 489 *Astol Calero-Toledo, Supt. of Police et al v. Pearson Yacht Leasing Co.* ___US ___, ___L.Ed.2d ____, ____S.Ct.____ (May 15, 1974). See Point VII (A) at page 76 entitled "The error in the federal court's logic.

(2) The Three-Judge Court was improperly invoked.

By order dated December 11, 1972, the Sixth Circuit Court of Appeals designated a three-judge district court to consider the constitutional claims of Pursue, Ltd. (See Appendix at pages L22-23). In that designation, the Court of Appeals stated:

> "This designation and composition of the three-judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-judge rather than a one-judge court. This is a matter best determined by the three-judge court. . . ."

Under this Court's rulings in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 8 L.Ed.2d 794, 796, 82 S.Ct. 1294 (June 25, 1962), the case should have been dismissed by the three-judge court for failure to raise a substantial federal question.

The constitutionality of O.R.C. Sections 3767 et seq. depends upon a pragmatic assessment of its operation in the particular circumstances. In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 1 L.Ed. 2d 1469, 77 S.Ct.1325 (June 24,1957) this Court in dealing with a like situation held at page 1474:

> "The judicial angle of vision in testing the validity of a statute like § 22-a is 'the operation and effect of the statute in substance. . . .' The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties. 'What is needed,' writes Professor Paul A. Freund. '*is a pragmatic assessment of its operation in the particular circumstances.* The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to a more particularistic analysis.' The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539 - 354 U.S. 441, 442 (emphasis added.)"

Appellants submit that where specific pleadings demonstrate on their face that a party is dealing in obscenity per se, it is plain error to rule that a substantial federal question is raised for the invocation of a three-judge court. See *Paris Adult Theater v. Slaton* 413 US 49, 37L.Ed.2d. 446, 456, 93 S.Ct. 2628 (June 21, 1973); *Kaplan v. California*,413 US 115, 37 L.Ed.2d. 492, 498, 93 S.Ct. 2680 (June 21, 1973) *Womack v. U.S.* 294Fd. 204 Jan. 12, 1961), cert denied in 365 U.S. 859, 81 S.Ct. 826, 5L.Ed. 2d 822 (Mar. 27, 1961). See also Point I (B) 2, supra, at page 36 and *Miller v. Reddin*, 293 F Supp. 216, at 229 (Nov. 18, 1968) wherein Federal District Judge Hauk, after examining the materials there involved, held that jurisdiction did not lie in a three-judge court, the court saying:

> "As such, each of the five books is clearly, unequivacally and uncontrovertibly obscene and pornographic in the hard core sense, and reasonably comes within the ambit and purview of the obscenity statute. . . "Thus it is impossible for the court to find any substantial federal question. . . ."

Though not considered by the federal court in its decision, the proof before the three-judge court as., acknowledged in the three-judge Federal District Court's opinion (Appendix, page A-10) demolished all claims of "extraordinary circumstances". The state trial court's finding of a public nuisance in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was based upon an examination of 16 motion picture films by the Allen County Common Pleas Court, the obscene nature of which was specially pleaded and apparent

upon the face of the complaint on file in the state court, which pleadings had been removed to the federal court on December 11, 1972. Further, the federal three-judge court had before it evidence in the form of affidavits appended to the trial brief filed on January 16, 1973 (see Statement of Facts, page 16 and Appendix at pages N3-12) and appended to the Motion to Dismiss filed on February 12, 1973 (see Statement of Facts, page 19 and Appendix, at pages O3-16, P2-39, Q4-41, and R6-51), which established, as matter of law, that *Pursue, Ltd.* was still maintaining the public nuisance on Jan. 10-30, 1972 and at the time of the federal court hearing on March 12, 1973.

(3) The Doors of a Court of Equity Should be Closed to the Unclean Litigant. Equity Will not be the Abettor of Iniquity.

The prayer of Pursue Ltd. for equitable relief is challenged by the ancient maxim of equity that a "man must come into a court of equity with clean hands." *Eyre, C.B. Dearing v. Earl of Winchelsea* (1787); Cox Eq. 318, 319. On this matter Federal District Judge Cox, speaking for the three-judge court (2-1) in *Irene McGrew, et al. v. City of Jackson, Mississippi*, 307 F. Supp. 754 (Dec. 31, 1969), said the following at page 765:

> "None of these plaintiffs have any standing in this court under the clean hands doctrine to successfully seek a recovery of that film. *[10]*"

At footnote 10 of Judge Cox's opinion are cited excerpts from one Supreme Court decision and two Circuit Court of Appeals decision:

> "10. Precision Instrument Mfg. Co. et al. v. Automotive Machinery Co., 65 S.Ct. 993 provides:
>
> " 'The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of iniquity." Bein v. Heath, 6 How. 228, 247, 12 L.Ed. 416. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughren v. Loughren, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 7 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 397-399. This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Keystone Driller Co. v. General Excavator Co., supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor. Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants, this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See Morton Salt Co. v.

G. S. Suppiger Co., 314 U.S. 488, 492-494, 788 (sic), 62 S. Ct. 402, 405, 406, 86 L.Ed. 363.

"To the same effect is Karl E. Stiegele and Speidel Corp. vs. J. M. Moore Import-Export Co., Inc., (2CA) 312 F.2d 588.

"New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc. (5CA) 291 F.2d 471, the court said:

" 'Without considering the legal issues on the merits, we affirm the judgment of the trial court. We do so by application of the age-old, but sometimes overlooked, doctrine that "he who comes into equity must come with clean hands.' "

"Earle R. Hanson & Associates v. Farmers Cooperative Creamery Company of Clear Lake, Wisconsin, (8CA) 403 F.2d 65, provides:

" 'The misconduct need not be of such a nature as to be actually fraudulent or constitute a basis for legal action. The plaintiff may be denied relief where his conduct has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable either in the benefit to himself or the injury to others. Johnson v. Freberg, 178 Minn. 594, 228 N.W. 159, 160 (1929). Cf Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381 (1945); Pope Mfg. Co. v. Gormully & Jeffrey Mfg. Co., 144 U.S. 224, 236-237 12 S.Ct. 643, 36 L.Ed. 426 (1892); Kool Vent Metal Awning Corp. of America v. Bottom, 205 F.2d 209 (8 Cir. 1953).' "

(a) In view of the Hardcore Nature of the films continuously being exhibited at the Cinema I Theater under the protection of the Federal District Court's Temporary Restraining Order of Dec. 1, 1972, Appellee's allegation in the federal court complaint of "great and immediate irreparable harm to the plaintiff" must be fraudulent as a matter of law.

The basis for the issuance of U.S. District Court Judge Walinski's temporary restraining order on Dec. 1, 1972, to wit: "to prevent great and immediate harm to the plaintiff", as pleaded by Appellee Pursue Ltd. was false and fraudulent. Appellants attached to the memorandum in support of the motion to dissolve the temporary restraining order and to dismiss and incorporated therein by reference Exhibits A, B, and C being affidavits of persons who had seen the motion pictures exhibited by Appellee at the Cinema I Theater, #69 Public Square, Lima, Ohio, for three successive weeks, January 10 - 30, 1973, together with photographic reductions of time-motion studies of said motion picture films. The original time-motion studies were made available to Appellee Pursue Ltd.'s counsel in the Clerks Office, having been previously filed therein. In light of such uncontradicted declarations as to the nature of Appellee's operations in January of 1973, during the month *after* Common Pleas Judge Lights Permanent Injunction of Nov. 30, 1973, and U.S. District Judge Walinski's temporary restraining order of Dec. 1, 1972, Appellee Pursue Ltd.'s contention that great and immediate irreparable harm would be sustained in that the Appellant law enforcement officers sought through the state court to interfere with the exhibition of "constitutionally protected" motion picture films at the Cinema I Theater must be deemed, in Equity, to be fraudulent as a matter of law.

Appellants contend that the Court should have dismissed the complaint as a sham pleading brought in bad faith; which, when combined with the petition for removal filed with this Court in Case No. C72-445, constituted a gross abuse by Appellee of the federal judicial process.

"A sham pleading is defined as one that while in good form is false in fact, or one good in form but false in fact and not pleaded in good faith." 61 Am Jur 2d, Pleading, Section 26, page 474.

"It has always been held that by virtue of its in-

herent power, the court has authority by summary means to prevent an abuse of its processes and peremptorily to dispose of causes of action or defenses that are sham, frivilous, or wholly vexations." 61 Am Jur 2d, Pleading, Section 211, page 631.

While Appellee's complaint may be in "good form", it is "false in fact" as evidenced by Appendices, P, Q and R. Appellee used the federal judicial process fraudulently (1) by filing a complaint claiming that it was exhibiting "constitutionally protected" films; (2) by obtaining a temporary restraining order on the same basis and falsely representing a fear of great and immediate irreparable harm and (3) by filing a sham petition for removal in this Court in Case No. C 72-445 thereby terminating the jurisdiction of the state court when Appellant Huffman attempted to comply with the federal court's order and afford plaintiff a prior adversary hearing as to obscenity.

Appellee's complaint was not brought in good faith as evidenced by the continuous exhibition of obscene films and the filing of the petition for removal one day before the prior adversary hearing to determine obscenity in the state court under the guidelines of the previous federal order.

Appellants need not dwell upon the obscenity of the motion picture films exhibited by plaintiff at the subject premises. Appendices P, Q, and R speak for themselves. The depths to which the pornography peddlers like plaintiff have fallen in the area of obscene motion pictures is best illustrated by the language used by the Court of Appeals for Lucas County in *State ex rel Ewing v. "Without a Stitch"*, 28 Ohio App 2d 107 at page 112.

> "By any test, medium core, hard core, as if res ipsa loquitur, obscenity per se, patently obscene, or screaming obscenity, the film (Without a Stitch) was obscene."

To permit Appellees to commercially exploit sex under the pretense of freedom of expression worked an injustice on the people of the State of Ohio in whose name the state action was brought and abused the federal court process.

III

UNDER THE DOCTRINE OF LIS PENDENS, PURSUE LTD. LACKED STANDING TO PROSECUTE THE CIVIL RIGHTS ACTION ALLEGED IN *PURSUE LTD. V. HUFFMAN ET AL 72C432.*

The Ohio Statute on *lis pendens*, O.R.C. Section 2703.26, provides that when summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title. This statute is simply declaratory of the Common Law doctrine of *lis pendens*, and is to be construed with reference to the Common Law rules in respect of the doctrine. 34 Ohio Jurisprudence 2d, Lis Pendens, page 685. In interpreting this statute, the Ohio Supreme Court has indicated that the doctrine is not based, or at least does not rest primarily, on any doctrine of notice but rests upon public policy and necessity. In other words, it may be said that the doctrine rests upon the power the court acquires over the property in *litis pendence*, and cannot have its functions frustrated by dealings *inter parties* with the *res* during litigation. Suits might be interminable, and judgments without fruits, if one litigant could impose upon an opposing litigant the necessity of making new parties as often as he chose to convey property involved in the suit. 34 Ohio Jurisprudence 2d, Lis Pendens, page 687. While the general rule is that a judgment or decree binds only parties and those in privity with them, and is not conclusive as against strangers to the action, yet, according to the doctrine of *lis pendens*, one who acquires an interest in property which is at that time involved in litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interests are acquired takes subject to the judgment or decree, and is as conclusively bound by the result of the litigation as

if he had been a party thereto from the outset. This is so irrespective of whether he has been made a party to the proceedings, or had actual notice of the pendency of the proceeding, and even where there was no possibility of his having had notice of the pendency of the litigation. 34 Ohio Jurisprudence 2d Lis Pendens, page 684.

In order that there may be a valid and effective *lis pendens*, four elements must be present: (1) The property must be of a character to be subject to the rule; (2) the Court must have jurisdiction both of the person and the *res*; (3) the property or *res* involved must be sufficiently described in the pleadings; and (4) the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.

On November 17, 1972, the date that Pursue, Ltd. acquired from William Dakota its leasehold interest in Cinema I at 69 Public Square, Lima, Ohio, a civil proceedings *in rem* to determine the status of property at that address (whether it was a public nuisance) entitled, *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326, was on file in Allen County Common Pleas Court and all parties in that action had been served (see Statement of Facts, pages 7-9). The complaint described by metes and bounds and by street address said premises and named the owners thereof (see Appendix at pages C5-6. Actual notice of such state lawsuit was given to Pursue, Ltd. on November 22, 1972, through service on Robert Hollis, the president of Pursue, Ltd. (see Statement of Facts at page 12. Further, Pursue, Ltd. was formed as a corporation by the attorneys for William Dakota in the state action for what would appear to be the specific purpose of taking an assignment of the property from Dakota in an attempt to avoid the consequences flowing from the adverse state court ruling. Finally Pursue, Ltd. had *actual* knowledge of the final judgment of November 30, 1972, in the state court action forfeiting the leasehold interest (for a

year) of William Dakota, Pursue, Ltd.'s, Assignor, prior to its filing of the federal action having alleged that fact in its complaint (see Appendix at pages J7-8).

Under the Statement of Facts, noted above, and the doctrine of *lis pendens*, the final judgment of the Allen County Common Pleas Court in *Ohio ex rel Huffman v. William Dakota*, 72 CIV 0326, on November 30, 1972, forfeiting the leasehold interest of William Dakota, operated to divest Pursue, Ltd. of such interest in the property.

IV

UNDER THE MANDATORY PROVISIONS OF 28 USC SECTION 2283, THE U. S. DISTRICT COURT LACKED JURISDICTION TO ENJOIN THE PROCEEDINGS IN THE STATE COURT.

(A) THE FEDERAL COURT LACKED JURISDICTION OVER THE REAL ESTATE WHICH, AT THAT TIME, WAS IN CUSTODIA LEX IN THE STATE COURT PROCEEDINGS.

The federal court lacked jurisdiction over the subject real estate which at that time was in *custodia lex* in the state court *in rem* proceedings in *Ohio ex rel Huffman v. Dakota*, 72 CIV 0326. The federal court failed to recognize that the state court civil action brought under Ohio Revised Code, Section 3767 *et seq.* was both an *in personam* and an *in rem* action[6] - *in personam*, in so far as the defendants, who were before the court, might be enjoined by the court's rulings, and *in rem*, in that the status of the property was also to be determined by the court. In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), Justice Frankfurter stated the principle as:

> "Third. This brings us to applications of Section 265 apart from these statutory qualifications. The early decisions of this Court applied the Act of 1793 as a matter of course. However, a line of cases beginning with Hagan v. Lucas, 10 Pet. 400, 9 L.Ed. 470, holds that the court, whether federal or state, which first

[6]See, however, the court's remarks on "standing" at footnote 1 (Appendix at page A-5).

takes possession of a res withdraws the property from the reach of the other. Taylor v. Carryl, 20 How. 583, 597, 15 L.Ed. 1028; Freeman v. Howe, 24 How. 450, 16 L.Ed. 749. See Kline v. Burke Construction Co., 260 U.S. 226, 235, 43 S.Ct. 79, 83, 67 L.Ed. 226, 24 ALR 1077: 'The rank and authority of the (federal and state) courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist the rule does not apply. Since that necessity does exist in actions in rem and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former but does not apply in the latter.' "

Following Toucey, supra, Congress enacted the anti-injunction statute in its present form. Thereafter, this Court again had occasion to consider the "in rem" exception in *Donovan v. Dallas*, 377 U.S. 408, 12 L.Ed.2 409, 84 S.Ct. 1579 (June 8, 1964). There, Justice Black, speaking for six members of the Court, acknowledged the continued vitality of that exception at page 412:

"Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Linda v. Thompson*, 305 U.S. 456, 465-468, 83 L.Ed. 285, 290-292, 59 S.Ct. 275. In Princess Lida this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction,

may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." Id., at 466, 83 L.Ed. at 291. See also *Kline v. Burke Construction Co.*, 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077 . . . While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal court proceedings in personam actions like the one here.

The only inference to be drawn from Justice Black's opinion is that, in the case of an "in rem" action in the State Court wherein the State Court has custody of such property and exclusive jurisdiction to proceed, not only may the Federal Court not interfere, but the shoe is actually on the other foot. The *State* Court has the authority to restrain any *federal* court proceedings which interfere with those *state* court "in rem" proceedings.

Nothing in existing case law contradicts this basic rule on jurisdictional power. As recently as *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2 705, 92 S.Ct. 2151 (June 19, 1972) this Court acknowledged this "in rem" exception to the blanket prohibition of the anti-injunction statute, at page 713:

"In addition to the exceptions to the anti-injunction statute found to be embodied in these various Acts of Congress, the Court recognized other "implied" exceptions to the blanket prohibition of the anti-injunction statute. One was an "in rem" exception, allowing a federal court to enjoin a state court proceeding in order to protect its jurisdiction of a res over which it had first acquired jurisdiction. (See e.g., *Toucey v. New York Life Ins. Co.*, 314 U.S., at 135-136, 86 L.Ed. at 105, 106, 137 A.L.R. 967; *Freeman v. Howe*, 24 How 450, 16 L.Ed. 749; *Kline v. Burke Construction Co.*, 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.)"

and, after a historical discussion of *Toucey v. New York Life Ins. Co.*, supra, concluded at page 714:

". . . The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 USC Sect. 2283. . . to 'restore the basic law as generally understood and interpreted prior to the Toucey decision. . .' "

The infirmities noted above, being apparent on the face of the complaint as filed, the federal court should have dismissed the federal action for lack of jurisdiction.

(1) SINCE THE FEDERAL COURT LACKED JURISDICTION OVER THE STATE COURT ACTION AND THE REAL ESTATE, ITS ORDER ENJOINING APPELLANTS HUFFMAN AND FAIR FROM EXECUTING THE ALLEN COUNTY COMMON PLEAS COURT JUDGMENT OF NOVEMBER 30, 1972, RELATING TO SUCH REAL ESTATE, WAS UNAUTHORIZED AND INVALID.

In a similar situation in *Donovan v. Dallas*, supra, this Court ruled that since the State Court was without power to restrain the federal court proceedings, it likewise had no authority to restrain the litigants from participating in those federal proceedings, at 413:

'And it does not matter that the prohibition here was addressed to the parties rather than to the federal court itself. For the heart of the rule as declared by this Court is that:

". . .where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. . .The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. (*Peck v. Jenness*, 7 How 612, 625, 12 L.Ed. 841,846. See also *Central National Bank v. Stevens* 169 U.S. 432, 42 L.Ed. 807, 18 S.Ct. 403; cf. *Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44, 54 note 23, 86 L.Ed. 28, 33, 62 S.Ct. 6, 136 A.L.R. 1222.)'

"Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise.

"It is argued here, however, that the Court of Civil Appeals' judgment of contempt should nevertheless be upheld on the premise that it was petitioners' duty to obey the restraining order whether that order was valid or invalid. The Court of Civil Appeals did not consider or pass upon this question, but acted on the assumption that petitioners were guilty of "wilfull disobedience of a valid order." 368 SW2d, at 211 (Emphasis supplied) *Since we hold the order restraining petitioners from prosecuting their case in the federal courts was not valid, but was invalid, petitioners have been punished for disobeying an invalid order."*

(B) A Federal Court has no Power to Interfere With State Appellate Proceedings. It may not Stay Proceedings in a State Court After a Final Judgment has Been Entered in the State Action.

Appellants contend that the interference of the respondent United States District Court for the Northern District of Ohio, Western Division, in the civil and criminal matters hereinabove recited, is an abuse of the federal process and disregards this Court's recent decisions on federal interference in criminal matters in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669 (Feb. 23, 1971); *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (Feb. 23, 1971); *Boyle v. Landry*, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696 (Feb. 23, 1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (Feb. 23, 1971); *Dyson v. Stein*, 401 U.S. 200, 91 S.Ct. 769, 27 L.Ed.2d 781 (Feb. 23, 1971) and *Byrne v. Karalexis*, 401 U.S. 216, 91 S.Ct. 777, 27 L.Ed.2d 792 (Feb. 23, 1971), as further explicated for civil proceedings in *Mitchum v. Foster*, 407 U.S. 225, 32 L.Ed.2d 705, 92 S.Ct. 2151 (June 19, 1972). As a direct result of such federal interference, the Cinema I Theatre at 69 Public Square, in Lima, Ohio, has been able to avoid the application of civil and criminal statutes, both substantive and procedural, and has thwarted the administration of due process of law in the State of Ohio.

The state procedures on enforcement of final judgments and appellate practice have been frustrated. Under Ohio Rules, the appellate process begins with the entry of a final judgment in the trial court, a fait accompli herein. To commence an appeal, a notice of appeal must be filed within 30 days after the entry of the final judgment. Ohio Rules of Appellate Procedure, rule 4(A) *Pursue, Ltd.* has elected not to appeal the state court judgment and the fact findings made by the trial court regarding the property interests *under which they claim* herein. Accordingly, under Ohio law, that final judgment represents the law of the case. *Independent of the question of the legal correctness of the federal court interference*, fact findings (2) and (3) of the Allen County Common Pleas Court, regarding the status of property at 69 Public Square, reading:

> "(2) That defendant, William H. Dakota, has engaged in a course of conduct of displaying motion picture films at said Cinema I Theatre which are obscene as (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value, all three elements coalescing.
>
> (3) That this conduct and the continuous exhibition of obscene motion picture films by the defendant constitutes a nuisance as defined by Section 3767.01 (c) of the Revised Ohio Code; . . . ."

which were not affected by such federal court interference, *are entitled to recognition.*

At pages 8 and 9 of their Brief in Opposition to Appellant's Application for a Stay Order or Writ of Injunction in *Huffman et al v. The United States District Court for The Northern District of Ohio et al* No. 72-1613. Appellees deny the finality of the State trial court judgment and place in question just what is the law of that case:

> "the order of the Allen County Court is final, insofar as it has not been modified by the opinion and order of the statutory three-judge court filed April 20, 1973 (see Appendix A-3, at A-12 of the 'Extra ordinary petition'), where the Court said in part as follows:
>
> 'Defendant (Petitioners herein) are therefore enjoined from executing that portion of the Allen County Common Pleas Court's Judgment of November 30, 1972, which orders the closing of Plaintiff's (Respondent herein) theatre pursuant to O.R.C. §376706.' "

But how shall the state of Ohio proceed to execute that portion of the final judgment which is not now subject to

attack, so as to apply Ohio justice to the case of a declared violation of the law? Or for that matter, how may the State of Ohio perfect its trial court victory in such litigation, ie., the valid findings of the state court re the existence of a public nuisance, in either the state or the federal appellate systems? Where Pursue, Ltd. has refused to appeal from the final judgment of the Common Pleas Court, may petitioners do so in the state court? Clearly not, for the findings there were favorable! Further, on an appeal within the federal system, how may the State of Ohio preserve the Common Pleas Court's factual findings re the existence of a public nuisance, where the three-judge Federal District Court refused to consider such evidentiary matters in their disposition of the case.

The problem herein is *not* the same problem encountered in *Byrne v. Karalexis*, 396 U.S. 976, 24 L.Ed.2d 447, 90 S.Ct. 469 (Dec. 15, 1969), which this Court faced and solved by granting a stay of the temporary injunction issued by the United States District Court for the District of Massachusetts pending the timely filing and disposition of an appeal. The distinguishing factor in *Byrne v. Karalexis, supra*, can be seen from Justice Douglas statement of facts in his dissent at page 486:

> "Mr. Justice Douglas, dissenting.
>
> "Respondents are the owners and operators of a motion picture theatre which has been showing the film, "I Am Curious (Yellow)." On June 3, 1969, they were indicted by the Suffolk County Grand Jury for possessing with intent to exhibit an obscene film in violation of Mass Gen Laws, c 272, §28A. On June 17, 1969, respondents brought an action in the United States District Court for the District of Massachusetts to enjoin future prosecutions for the showing of "I Am Curious (Yellow)" and to declare that prosecution and the Massachusetts statute unconstitutional. On June 24, 1969, the three-judge District Court enjoined the prosecution on the ground that the indictments did not allege

> scienter. The indictments were then dismissed, and new indictments were thereafter returned. Respondent's request for a temporary injunction barring the second prosecution was denied by the District Court on July 15, 1969. The court stated that it would not consider a claim that the film was not obscene as an evidentiary matter, but invited the parties to submit briefs on the question whether the Massachusetts statute was unconstitutional on its face.
>
> "Respondents were convicted of the state obscenity offense on November 12, 1969. The applicant in this proceeding, the District Attorney for Suffolk County, has not agreed that respondents may exhibit the film pending the appeal of their convictions. On November 19, 1969, applicant moved the District Court to abstain from deciding the constitutionality of the Massachusetts statute, pending the resolution of that issue in the state courts. On November 28, 1969, the District Court, by a 2-1 vote, denied the motion and authorized a temporary injunction enjoining applicant from interfering with respondents as respect future showings of the film, "I Am Curious (Yellow)," pending a final disposition by the merits.
>
> "Applicant now requests this court to stay the temporary injunction which was issued by the District Court.
>
> *"The injunction issued by the District Court does not interfere in any way with the criminal conviction already obtained in the Massachusetts courts. That case will proceed unaffected by anything the federal court does, save for final execution of the state judgment. Dombrowski v. Pfister*, 380 US 479, 14 L Ed 2d 22, 85 S Ct 1116, is different. There we did not force petitioners to risk vindication of their constitutional rights in a state prosecution under an "overly broad" state statute. Id., at 486, 14 L Ed 2d at 28. But in this case that risk was faced and resolution of the constitutional issues is being undertaken in the state courts. All that the federal court proposes is protection of respondents against

repeated prosecutions, while both the state courts and federal courts are resolving the constitutional issues. Enjoining one state prosecution, though perhaps permissible under Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441, *would not be in keeping with more recent decisions. Douglas v. Jeannette*, 319 US 157, 87 L Ed 1324, 63 S Ct 877. But I read the sparse record before us differently from Mr. Justice Stewart and believe that we deal here with threats of repeated prosecutions; and those threats seem to me to be no less ominous to the federal constitutional regime than the threatened harassment of union leaders in *Hague v. CIO*, 307 US 496, 83 L Ed 1423, 59 S Ct 954, who were asserting First Amendment rights in explaining the purposes of the new National Labor Relations Act. See the opinion of Mr. Justice Roberts and Mr. Justice Black, id., at 504-506, 83 L Ed at 1430, 1431. *"There may in time be a collision between the two systems for us to resolve. Meanwhile I would let the two orderly processes go ahead. For I can imagine no better and smoother accommodation of the needs of the two regimes than that designed by the District Court.* (our emphasis.)

See also Justice Black's concurring opinion at page 489:

"In this case a Federal District Court *stepped into the middle of a pending state criminal prosecution, rendered an opinion in effect deciding the fundamental constitutional issue in the state case, and enjoined the initiation of new prosecutions of these defendants or the execution of any sentence imposed on them in the pending state case.* One of the fundamental aspects of our federal constitutional system requires that federal courts refrain from interfering in pending state criminal prosecutions except in highly unusual and very limited circumstances. I do not think the facts of this case present an occasion for departure from that general rule. It is for that reason alone that I agree with the Court's decision to stay the injunction issued by the Federal District Court against the State." (our emphasis)

By interfering with the final judgment herein, the three-judge Federal District Court has prevented the development of even Justice Douglas' "concurrent jurisdiction to collision." There is and can be no parallel appeal taking place within the state system. It would appear that the "collision" upon which Justice Douglas reflected, has already come to pass herein. Under the laws enacted by the Ohio Legislature and the decisions rendered thereon by the Ohio judiciary, petitioners have a duty, and should be able to enforce the final judgment of the Common Pleas Court of Allen County, Ohio, of November 30, 1972, as to which no appeal was perfected, which requires that the Cinema I Theatre be closed as a public nuisance, being a disorderly house which regularly exhibits obscene motion picture films as a course of conduct. Section 3767.05 defines that duty as follows:

> ". . . if the existence of a nuisance is established on the trial, a judgment shall be entered which shall perpetually enjoin the defendant and any other person from *further maintaining the nuisance*. . . ." (Our emphasis)

Section 3767.06 also provides, in part, as follows:

> ". . . if such innocence is established, such unsold personal property and contents shall be delivered to the owner, *otherwise it shall be sold*, as provided in this section. For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution; *and for closing the place and keeping it closed*, a reasonable sum shall be allowed by the court. . . ." (Our emphasis)

In carrying out those duties, appellants have been placed upon the horns of a dilemma in that they are faced with the possibility of being held in contempt of the federal order of judgment herein which, if followed by appellants, would require them to be guilty of nonfeasance in the performance of their duties as state law enforcement officers.

V

THE FEDERAL REMOVAL STATUTES DO NOT AUTHORIZE THE REMOVAL OF A CIVIL ACTION TO ABATE A PUBLIC NUISANCE, NOR IN ANY CASE, WHERE THE PETITION FOR REMOVAL IS UNTIMELY FILED (i.e. AFTER FINAL JUDGMENT). THE ORDER OF THE THREE JUDGE COURT ON APRIL 26, 1973, DISMISSING THE REMOVED STATE ACTION WAS NULL AND VOID.

For the Federal Court to acquire jurisdiction *over the Public Nuisance action and* the *res* under the circumstances herein prevailing, it would have been necessary to remove the entire state action to the federal court in a removal action authorized by 28 U.S.C. Sect. 1441 or 1443. The removal action in *State of Ohio ex rel Huffman v. Dakota*, however, was untimely, not having been filed until Dec. 11, 1972, at which time the Allen County Common Pleas Court had already handed down its final judgment of Nov. 30, 1972, on the matter.[9]

(A) 28 U.S.C. SECTION 1441(b) DOES NOT AUTHORIZE THE REMOVAL OF A PUBLIC NUISANCE ACTION WHERE A FIRST AMENDMENT CLAIM IS RAISED AS A DEFENSE.

A civil action to abate a public nuisance is not a "civil action of which the district courts have original jurisdiction

[9]Service of the amended complaint was affected on Sept. 25, 1972 and, on Nov. 30, 1972, the Allen County Common Pleas Court entered a permanent injunction in State of Ohio ex rel Huffman v. Dakota, C72-0326, (see Statement of Facts at page 13 and Appendix at pages I3-7). On Dec. 11, 1972, Robert Hollis, President of Pursue, Ltd., as successor to the interest of William Dakota, filed a petition for removal in the federal district court entitled Dakota v. State of Ohio ex rel. Huffman, C72-445, (see Statement of Facts at page 16, and Appendix L, pages 3-7), effecting its removal from the state court. On April 26, 1973, respondent three judge federal district court, sua sponte, entered an order of judgment, dismissing the case as moot (see Statement of Facts at page 22 and Appendix at S-3).

founded on a claim or right arising under the Constitution, etc. . .", as that phrase is employed in 28 U.S.C. Sect. 1441(b),[10] so as to satsify the test for removal jurisdiction. Quite the contrary, the public nuisance cause of action is one in which state courts traditionally have original jurisdiction, and is founded upon a claim arising under the sovereign power of the state to safeguard state interests. *Grove Press Inc., v. City of Philadelphia*, 300 F Supp. 281 at 292 (May 20, 1969). The fact that a first amendment claim may be raised in defense thereto does not satisfy the requirements of the removal statute. *Gully v. First National Bank*, 299 US 109 (Nov. 9, 1936).

In *Grove Press, Inc., v. City of Philadelphia*, supra, the City of Philadelphia brought an action to abate "I Am Curious (Yellow)" as a public nuisance. In denying removal of the public nuisance action under 28 U.S.C. section 1441(b), the Court employed the following rationale at page 291:

> "In opposing removal under Title 28 U.S.C. § 1441, and urging its motion to remand, the City relies most strongly upon *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936). The City emphasizes *Gully's* oft-quoted language as the appropriate standard for determining the removability of a state action:
>
> > ' To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . such that it will be supported if the Constitution or laws of the

[10]Section 1441(b) reads:

Section 1441. Actions removable generally.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

United States are given one construction or effect, and defeated if they receive another. . . (T)he controversy must be disclosed on the face of the complaint, unaided by the answer or petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction insofar as it goes beyond a statement of plaintiff's cause of action and anticipates or replies to a probable defense." *Gully*, supra, 299 U.S. at 112-113, 57 S.Ct. at 97.'

The defendants distinguish *Gully* by noting that there the Court was reluctant to remove because in that case' . . . a question of federal law is (merely) lurking in the background . . .', 299 U.S. at 117, 57 S.Ct. at 100, whereas here,

' (t)he right of petitioner to recover under their complaint will be sustained if the Constitution and laws are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction.' *Bell v. Hood*, 327 U.S. 678, 683, 695,66 S.Ct. 773, 777, 90 L.Ed. 939 (1945). . ."

"Although it is likely that the alleged obscenity of "I Am Curious (Yellow)" will be the critical issue in the state court proceeding, this Court nevertheless can not conclude that removal to the federal court of this type of case either is contemplated by Title 28 U.S.C. § 1441 or supported by the policy considerations relevant to the removal problem.

"The most recent federal cases supporting removal which are relied upon by the defendants, e.g. *Avco Corp. v. Aero Lodge No. 735, I.A.M. and A.W.*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 2d 126 (April 8, 1968), *Ivy Broadcasting Co. v. American Tel. and Tel. Co.*, 391 F.2d. 486, 489 (C.A. 2, 1968), and *Sylgab Steel and Wire Corp., v. Strickland Transportation Co.*, 270 F. Supp. 264 (E.D.N.Y., 1967), are all distinguishable from this case in at least one significant respect - they involved matters of legal dispute about which Congress had evi-

denced much concern and over which Congress, through the passage of comprehensive legislation, had exercised its pre-emptive authority over the state legislatures. For example, in *Ivy*, supra, removal was sustained primarily because the Court concluded that resolution of the plaintiff's claim for breach of contract in the rendering of interstate telephone service by the defendant-carrier necessarily depended upon interpretation of matters of federal common law, as such law developed to fill the interstices of a comprehensive federal statutory scheme. Similarily, the District Court in *Sylgab*, supra, 270 F. Supp. at 269, upheld removal because' . . . of the comprehensive nature of federal substantive regulation of the rights of shippers and carriers with respect to damaged goods. . .'

The most expansive standard yet relied upon by a federal court is determining the removeability of a state action appears in *Ivy*:

' (W)hether the complaint is for a remedy expressly granted by an act of Congress or otherwise 'inferred' from federal law, or whether a properly pleaded 'state created' claim itself presents a 'pivotal question of federal law,' for example because an act of Congress must be construed or 'federal common law' governs some disputed aspect of the claim."

The City's prayer for an injunction in the state courts neither constitutes a request ". . .for a remedy expressly granted by an Act of Congress. . ." nor does it necessarily require the construction of a Congressional Act or federal common law. The City derives its authority to seek an injunction against this "nuisance" not from federal law, but rather from sovereign power delegated to it by the Commonwealth of Pennsylvania for the purpose of permitting it to protect the health and welfare of its citizens.

"Furthermore, the defendants have failed to draw any distinction between this case and thousands of

other cases, properly instituted and prosecuted in the state courts, where defendants intend to rely primarily upon federal constitutional defenses. *Sustaining removal in Civil Action No. 69-934 would create a precedent for sustaining removal of all state cases where defendants arrested and charged with lesser misdemeanors planned to rely on Federal Constitutional defenses.* State courts, of course, have the same obligation as federal courts to vindicate meritorious federal constitutional claims and, assuming that an allegation that they will not do so is relevant in support of any request for federal judicial intervention, cf. *Dombrowski*, supra, it is not relevant of purposes of removing an action here pursuant to Title 28 U.S.C. § 1441." (our emphasis)

(B) 28 U.S.C. SECTION 1443(1) DOES NOT AUTHORIZE THE REMOVAL OF A PUBLIC NUISANCE ACTION WHERE A FIRST AMENDMENT "CIVIL RIGHTS" CLAIM IS RAISED AS A DEFENSE.

Appellees arguments that they, as film exhibitors, cannot enforce their first amendment *"civil"* rights as citizens of the United States to freedom of speech and the press in the Court of Common Pleas of Allen County, Ohio, and thus qualify for removal jurisdiction under 28 U.S.C. sect. 1443(1)[1] is answered in *Georgia v. Rachel* 384 U.S. 780, 791 (1966):

". . . the phrase 'any law providing for . . . equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality.

[1] Section 1443(1) reads:
1443. Civil rights cases. Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

Thus the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under Section 1443. . ."

(C) THE FEDERAL REMOVAL STATUTES DO NOT AUTHORIZE THE REMOVAL OF A STATE ACTION IN WHICH THE PETITION FOR REMOVAL IS UNTIMELY FILED. THE OPINION AND ORDER OF THE THREE JUDGE COURT ON APRIL 26, 1973, SUA SPONTE, DISMISSING THE REMOVED STATE ACTION, *WILLIAM DAKOTA* ET AL *v. STATE OF OHIO EX REL LAWRENCE S. HUFFMAN 72* CIV. 445 AS MOOT, WAS NULL AND VOID.

The statutory scheme for Removal of Actions to the federal court requires that the petition for removal of a civil action or proceedings shall be timely filed. 28 U.S.C. sect. 1446(b). 76 C.J.S. Removal of Causes, section 182 et seq. at pages 1045 - 1053. Where no right of removal exists, any action or proceedings by such court looking toward a determination of the controversy is of no force or effect and any findings or orders made by it, other than an order of remand are null and void, 76 C.J.S. Removal of Causes, section 182 at page 1045 and section 240 at pages 1106 - 1107.

Further, appellants know of no authority which permits the removal of a state case *after* final judgment. To countenance that procedure would interfere with the state appellate process which commence upon the entry of the final judgment. (See Point IV B at page 56)

VI

THE OHIO OBSCENITY STATUTE, AS CONSTRUED BY THE OHIO JUDICIARY, AND AS APPLIED BY THE TRIAL JUDGE, COMPLIES WITH THE SPECIFICITY REQUIREMENT ENUNCIATED BY THIS COURT IN *MILLER V. CALIFORNIA* DECIDED JUNE 21, 1973.

The Allen County nuisance abatement action in *State of Ohio ex rel Huffman v. Dakota*, 72 CIV 0326 was filed on Sept. 18, 1972. Long before that time, the Ohio judiciary had construed the obscenity laws of the State of Ohio in a manner which rendered the word "obscene", specific. See *City of Youngstown, Ohio v. De Loreto*, 251 N.E.2d 491 at 500, 48 Ohio Op. 2d 393 (Sept. 10, 1969); State of Ohio ex *rel. Ewing v. Without a Stitch*, 57 Ohio Op. 2d 184 at the footnote on page 187 (July 9, 1971); and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 141, 142, 27 Ohio St. 2d 278 (July 21, 1971), as adhered to on remand in *Ohio ex rel. Keating v. Vixen* 37 Ohio St. 2, 215, 301 N.E. 2d 880 (Sept. 26, 1973).

Further, the Ohio legislature had already enacted specific legislation (effective Sept. 15, 1970) of the type which was exemplified by this court in *Miller v. California* 413 U.S. 15, 37 LEd.2d 419, 93 S.Ct. 2607 (June 21, 1973), and which this court wrote into the federal statutes as a federal standard in U.S. *v. 12-200 ft. Reels of Super 8MM Film* 413 U.S. 123, 37 LEd.2d 500, 93 S.Ct. 2665.

(A) The Ohio Judiciary, Through Decisional Law, Has Engrafted Specific Standards Onto the Term "Obscene" as Used in the Ohio Obscenity Laws.

The common standards of right and wrong embodied in the criminal statutes of Ohio dealing with sexual morality have, by judicial construction, been subsumed in the term "obscene" as used in the obscenity statutes. If such depictions are accompanied with the same "mens rea" which defines an offense under the criminal statutes, such also is in violation of the specific standards prescribed by the term

"obscene". In *De Loreto, supra*, the Court in examining several sex magazines on appeal, enumerated the state statutes and city ordinances which prohibited immoral conduct. From that the Court deduced what the moral standards of Ohio people on sex were, at page 500:

> *"The moral standards of the people in Ohio on sex are readily ascertainable because of the statutes that have been enacted on the subject. Youngstown has similar ordinances to the statutes of the state of Ohio.*

OHIO LAWS INDICATING SEX MORAL STANDARDS

"Laws of Ohio and the city of Youngstown relating to sex, which indicated the moral standards of the people of Ohio, prohibit the following:

"1. Adultery or fornication. Section 2905.08, Revised Code. Youngstown City Ordinance 132.03.

"2. Prostitution. Sections 2905.14 and 2905-27, Revised Code. Youngstown City Ordinance Sections 132.01, 132.04 and 132.06.

"3. Any person eighteen years of age or over wilfully making an indecent exposure of his person in a place or in a place where there are other persons to be offended or annoyed thereby, or solicit another to engage in an act of sex perversion. Section 2905.30, Revised Code. Youngstown City Ordinance 132.11.

"4. Any person eighteen years of age or over wilfully exposing his or her private parts in the presence of two or more persons of the opposite sex. "Private Parts" means the external genitalia of the human body. Section 2905.31, Revised Code.

"5. Sodomy, Section 2905.44, Revised Code.

MORAL STANDARDS OF OHIO PEOPLE ON SEX

"Thus, the laws of Ohio and the City of Youngstown prohibit extra-marital sexual relations, as offensive to the moral standards of the people of Ohio. Nudity to the ex-

tent of exposing the external genitalia of a male or female human body is also prohibited as likely to incite or encourage extra-marital sexual relations.

"We hold that one of the purposes of Section 2905.34, Revised Code, and of Youngstown City Ordinance Section 132.09(a), is directed at obscene publications that are likely to incite or encourage sexual conduct contrary to the moral standards of the people of Ohio." (Our emphasis.)

Hamilton County Common Pleas Judge Leis, in his trial court opinion in *Ohio ex rel. Keating v. Vixen*, dated November 17, 1969, applied the same rationale in his evaluation of the contemporary standards of the community. See Appellants' Statement as to Jurisdiction in *"A Motion Picture Film Entitled "Vixen" et al v. State of Ohio, ex rel Keating*, No. 71-599 at page 13a.

"The Court, under its prerogative to believe or disbelieve, or accept all or part, or none of the testimony and evidence presented, is of the opinion that such testimony does not reflect the true feeling and acceptability by the community of 'Vixen' type of film. First of all, acceptability by an audience is not the true criteria of the measurement of the community standard, and acceptance of a film by the community, because the attending audience is but a segment of the community, and I might say a very small segment of the Community.

"A proper criteria for evaluation of the contemporary standard of the community is its establishment and enforcement of laws governing the conduct of its citizenry. A simple reference in the Ohio Revised Code sets forth the moral standards of the people of Ohio, including this community, on sex matters. These laws are enforced in this community, and include:

Adultery or Fornication - Section 2905.08 O.R.C.

Prostitution - Section 2905.10 O.R.C.

Indecent Exposure - Section 2905.30 O.R.C.

Solicitation of Unnatural Sex Act - Section 2905.30 O.R.C.

Nudism - Section 2905.31 O.R.C.

Incest - Section 2905.07 O.R.C.

Rape - Section 2905.01 (etc.) O.R.C.

Sodomy - Section 2905.44 O.R.C.

"These laws as well as local ordinances set forth the moral standard of the community, and under proper presentation, they are enforced.

"In the case of *Trans Lux Distributing Corp. v. Board of Regents* (248 NYS 2d 857), Judge Burke states 'It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street.'

"The community does not allow, or condone, fornication on the street corner, or any public display of nakedness. Bare bosom women are not permitted to walk the streets. If this happens, prosecution follows. *If the community does not accept (and permit) public display of sex acts and nakedness on its streets and in public places, can it be said that a movie displaying such conduct meets the standards of the community? Definitely not."* (Our emphasis.)

Lucas County Common Pleas Judge Nicholas J. Walinski arrived at the same result in his Findings of Fact and Conclusions of Law handed down in *State of Ohio ex rel. Ewing v. Without A Stitch*, on September 15, 1970.

"Finding of Fact . . .

"10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. *The proper criteria for a valuation of contemporary standards of the community relating to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing*

the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters and that there is generally attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.R.C., Indecent Exposure
Sec. 2905.30 O.R.C., Soliciation of Unnatural Sex Act
Sec. 2905.31 O.R.C., Nudism
Sec. 2905.44 O.R.C., Sodomy

There are existing similar statutes in the majority of states, giving an inference of national community standards." (Our emphasis.)

In affirming the decision of Judge Walinski, the Court of Appeals of Lucas County noted in *State ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971):

"We have also considered as indicative but not conclusive of national standards the laws of the State of Ohio and other states.* See Roth, 354 U.S. at page 485."

As a footnote to that portion of the Court's opinion, the following appeared:

*"*Among the laws of Ohio which are indicative are the following. See Section 2905.34, Revised Code. Its pertinent parts are as follows:* . . .

"This statute was effective September 15, 1970, after the filing of the complaint, but before the decision of the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:

"Section 2905.08 Revised Code - Adultery or Fornication: Section 2905.10, Revised Code - Inducing illicit

intercourse; Section 2905.26, Revised Code - Prostitution, lewdness and assignation defined: Section 2905.30, Revised Code - Indecent exposure: Section 2905.31, Revised Code - Nudism; Section 2905.44, Revised Code - Sodomy." (Our emphasis.)

The Ohio Supreme Court in its opinion in *State ex rel. Keating V. Vixen*, 27 Ohio St. 2d 278, 272 N.E.2d 137 (July 21, 1971) removed all doubt that the above decisional law represented an authoritative interpretation of the word "obscene" in the State of Ohio, at page 140:

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.

"Since the real issue before this court is whether the injunction should be dissolved, or continued in force and effect, R. C. § § 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below.

"Those two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that: 'No person, with knowledge of the content and character of the * * * motion picture * * * involved, shall * * * present such motion picture * * * before an audience which contains a series of display * * * of * * * sexual intercourse * * * the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is * * * for commercial exploitation. * * * (Italicized words supplied.) So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.' *Schneider v. State* (1939), 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

"Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine, scientific, educational sociological, moral, or artistic purpose' is forbidden by Ohio law. Here, there is no dispute as to the fact that

'Vixen' does depict numerous acts of purported sexual intercourse, and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. (Our emphasis.) * * *

"Therefore, where scenes in a motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R. C. § § 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. § 3767.01, and their exhibition may be enjoined as provided in R.C. § 3767.02 et seq." (Our emphasis).

In Black on "Interpretation of Laws", Second Edition the author comments as follows on the significance of such authoritative rulings, at page 616:

> "It is an ancient maxim of the law that 'legis interpretatio legis vim obtinet'; that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law, by becoming, as it were, a part of the statute itself. The importance of adhering to this rule is seen in the fact that the judicial explanation of an obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. 'The court almost always, in deciding any question, creates a moral power above itself.' "

(B) Ohio Revised Code Section 2905.34, Which was Effective at the Time the State Abatement Action was Tried in the Allen County Common Pleas Court, Provided Specific Standards of the Type Exemplified by This Court in California v. Miller.[12]

Ohio Revised Code Section 2905.34 reads as follows:

R.C. 2905.34:

[12] Note, in particular, O.R.C. Section 2905.34A (2) and (4) and the reference in those sections to "sexual conduct" as that term is defined in Section 2905.34 (D).

As used in Sections 2903.13 to 2903.16, inclusive, and Sections 2905.34 and 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

1. Its dominant appeal is to prurient interest;
2. Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
3. Its dominate tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence cruelty, or brutality;
4. It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

(C) Appellant, in the State Nuisance Abatement Complaint, pleaded specific violations of specific state standards. The trial court final judgment found such allegations to be true.

In accordance with the appellate decisions in City of *Youngstown v. DeLoreto, supra; State of Ohio ex rel Ewing v. "Without A Stitch", supra, and State of Ohio ex rel Keating v. Vixen, supra,* appellant herein pleaded specifically the violation of specific state standards at paragraph 10 of his pleadings.[8] (See Appendix at pages C10-13). Allen County Common Pleas Judge Light, in his final judgment of Nov. 10, 1972, found such allegations to be true. (See Appendix at pages I3-5).

VII

SECTIONS 3767.04 AND 3767.06 OF THE OHIO REVISED CODE ARE CONSTITUTIONAL ON THEIR FACE.

(A) THE ERROR IN THE FEDERAL COURT'S LOGIC.

The federal court below, in riveting its attention on the prior restraint "in personam" implications of *Near v. Minnesota* 283 US 697, 75 L.Ed 1357, 51 S.Ct. 625, completely lost sight of the fact that the Ohio Legislature had undertaken in O.R.C. sections 3767 et seq. to provide what, unquestionably, is an "in rem" and not an "in personam" remedy. The "in personam" provisions which troubled the federal court are not an essential part of the statutory scheme and should have been disregarded by that Court under the paramount rule of statutory construction which requires a Court to ascertain and, where possible, to give effect to the intent and

purpose of the legislature, as expressed in the statute. 82 C.J.S. Statutes, page 560.

Instead of according the state lawsuit its historical treatment as one which involved the *status* of real property and a determination of whether or not the "res" constituted a public nuisance from which certain statutory penalties flowed, namely the forfeiture of the leasehold interest in such property (a legal equivalent of "loss of use for a year") and the forfeiture of the personal property used therein - an approach which presented absolutely no constitutional questions, see *U.S. v. U.S. Coin and Currency*, 401 US 715, 28 L.Ed 2, 434, 91 S.Ct. 1041 (Apr 5, 1971), *One Lot of Emerald Cut Stones* and *One Ring v. U.S.* 409, U.S. 232, 34, LEd.2d 438,92, S.Ct. 489 (Dec. 11, 1972) - the court for some reason felt constrained to focus its attention on particular language of the statute which, when viewed by itself and apart from the general statutory scheme might, as an in personam restriction against an individual, be questioned under the *Near v. Minnesota, supra,* prior restraint doctrine.

Appellants herein submit that the error in the logic of the federal district court's opinion (Appendix at pages A3-12) is the result of faulty deductive reasoning, which proceeded somewhat as follows:

Major Premise: To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under *Near v. Minnesota, supra,* (Appendix at page A-11)

Minor Premise: The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films.(see Appendix at pages A-4, 10 and 11)

Conclusion: The Ohio Public Nuisance statute, O.R.C. sections 3767.04 and 3767.06 are unconstitutional.

The syllogism formed by the above three propositions is inaccurate for the facts in the minor premise have been used falsely, not having been given in their actual setting of experience, but abstractly from a larger whole of circumstances. See Legal Reasoning and Briefing, by Brumbaugh, copyright

1917 by the Bobbs-Merrill Co. at page 56:

"The situation is different if the answer or plea be one in confession and avoidance. Logically considered, *the admission or confession is not that the two premises are legally connected; but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out*, and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts - now we perceive that it demands also that all of such facts be correctly reported. *Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances.* Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of completeness against which an answer Confession and Avoidance is directed.

"*The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that it no longer expresses any cause of action against the defendant, or one of a different import and effect.* In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in obeyance until the latter question upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

"In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but *it does a very unique thing - it invokes a wider rule of law within which the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead - and thus it challenges the right of the plaintiff to put the special set of facts in issue.* Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser - the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise." (our emphasis)

On the above matter, consider the following second syllogism:

Major Premise: Under the ancient doctrine of deodand expressed in *U.S. v. U. S. Coin and Currency, supra*, and *One Lot of Emerald Cut Stones and One Ring v. U.S. supra*, where a place is determined in a legal proceedings to be

operating as a public nuisance involving contraband, a penalty may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period of up to one year.

Minor Premise: The Ohio Public Nuisance Statute, O.R.C. sections 3767.04 and 3767.06 operate to prevent the showing of films in the future without an adversary hearing on the obscenity of those films thru forfeiture of the leasehold (use of the premises) as a penalty.

Conclusion: The Ohio Public Nuisance statute O.R.C. sections 3767.04 and 3767.06 are constitutional.

(B) HISTORICAL BACKGROUND

Consider the following hypothetical situation: Suppose that, over a period of several months, Jurisdiction "A" filed a succession of seven different criminal complaints against an activity, alleging that on each of those seven occasions two obscene motion picture films were exhibited, and that the obscenity laws had been violated by such conduct at that address. Suppose further, that, after each criminal charge a criminal trial had taken place and the defendant had been found guilty as charged. Can there be any doubt that, under general principles of law and without benefit of statute, a district attorney in that jurisdiction could successfully state a civil cause of action, alleging that the repeated and continuing illegal conduct at that address constituted a public nuisance which should be abated? Is there any doubt that an equity court could make a finding that such repeated illegal conduct at that address constituted a public nuisance and, upon a further finding that such condition *was continuing and presently existed*, could authorize that the same be closed as a public nuisance? Further, is there any doubt that, having found the public nuisance to be *presently in being*, the equity court could lay down the conditions upon which the activity might remain in operation, one of which could be that the errant party show to the satisfaction of the court that the public nuisance no longer existed? See *Crain v. State*, 3 Ind. 193 (1851); Perkins on Criminal Law, Foundation Press, 1954; *Bloss v. Paris Township*, 157 N.W.

2d 260 (Apr. 1, 1968); Joyce, Law of Nuisances, Sect. 7, page 15; *Cactus Corporation d.b.a. The Apache Drive-in Theatre v. State of Arizona ex rel Murphy, City Attorney of Tuscon*, 480 P.2d 375 (Feb. 9, 1971); *Evans Theatre Corp. et al v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (Mar. 4, 1971), cert. den. Nov. 7, 1971, in 404 U.S. 950, 30 L.Ed.2d 267, 92 S.Ct. 281; *Weis v. Superior Court of San Diego County*, 30 Cal. App. 730, cited with approval in *California v. Lim*, 18 Cal.2d 872. *Maita v. Whitmore* 365 F. Supp. 1331 (Nov. 9, 1973); *Richards v. Texas* 497 SW2 770 at 780 (July 2, 1973).

Add an additional factor for a new hypothetical. Suppose that in the above Jurisdiction "A", the legal process for getting criminal matters to trial and for getting such criminal trials finalized has been rendered inoperative for any of a number of reasons; may Jurisdiction "A" make an end around run on the criminal trial pitfall and select, in the first instance, as the primary law enforcement tool; (1) the civil action to abate a public nuisance, alleging and proving in that single trial a course of continuing conduct by establishing as evidence the acts which comprise the seven alleged criminal violations, (2) asking that the law of forfeitures in connection with public nuisance be applied and (3) assessing costs of abatement, including Attorney's Fees, where the conduct involved can be said to be malicious?

To ask the above rhetorical questions is to supply the obvious answers. The power of the state court in such matters is clear. In *Kingsley Book, Inc. v. Brown*, 354 U.S. 436, Justice Frankfurter, writing for the majority court, supplied the following answer at page 441:

> "We need not linger over the suggestion that something can be drawn out of the due process clause of the Fourteenth Amendment that restricts New York to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this court thus to limit the state in resorting to various weapons in the armory of the law. *Whether proscribed conduct is to be visited by a criminal prosecution or by*

a qui tam action, or by an injunction or by some or all of these remedies in combination *is a matter within the legislature's range of choice (citation).* If New York chooses to subject persons who disseminate obscene 'literature' to criminal prosecution *and also to treat with such books as deodands of old, or both*, with due regard of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies. . . ." (our emphasis.)

The terms "qui tam action" and "deodand",[13] referred to by Justice Frankfurter, are defined in Black's Law Dictionary, Revised, 4th Editon, as:

> "QUI TAM. Lat. 'Who as well .' An action brought by an informer under a statute *which establishes a penalty for the commission or omission of a certain act*, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution, is called a 'qui tam action'; because the plaintiff states that he sues as well for the state as for himself. See In Re Barker, 56 Vt. 14; Grover v. Morris, 73 N.Y. 478." (our emphasis.)
>
> "DEODAND (L.Lat. DEO dandum, a thing to be given to God) in English law. *Any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the Crown* to be applied to pious uses, and distributed in alms by the High Almoner. 1 Hale, P.C. 419; Fleta, Lib 1, C25; 1 Bl. Comm. 300; 2 Steth. Comm. 365. See Parker-Harris Co. v. Tate, 135 Tenn. 509, 188 S.W. 54, LRA 1916F, 935." (our Emphasis)

When the authors of the Ohio Public Nuisance Statute first sat down, over 50 years ago, to draft new legislation on this ancient problem, they were thinking of the laws of forfeiture and deodand when they pondered new solutions in this area of public nuisance, to compensate for certain inadequacies of the criminal law.

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[13] See Calero-Toledo v. Pearson Yacht Leasing Co. ___U.S. ___ decided May 15, 1974.

Ohio Revised Code, Section 3767 et seq. providing for abatement of public nuisances and certain forfeitures in connection therewith, had its derivation at a time in our history when lewdness of a different type was plaguing the Nation. The procedural problems however, were quite similar. See 20 Columbia Law Review, at 604, which traces the history of such litigation:

> " 'RED LIGHT' INJUNCTION AND ABATEMENT ACTS' – *The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' laws for the abatement of disorderly houses.* Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment *to the inadequacy of criminal prosecutions;* and accordingly permit any citizen of the county wherein the nuisance exists to bring his civil action to enjoin and abate it. The effectiveness of the legislation lies in stringent provisions for abatement and in penalities for contempt.
>
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . ." (our emphasis.)

The historical development of this type of statute has been in three directions: (1) Some states, like Missouri, use language which is clearly limited to houses of prostitution (M.R.S. Section 563.120); (2) other states, like California, have used statutory language like "Prostitution, assignation and lewdness" in which, by judicial decision, the term "lewdness" has been given a broad meaning. See *People v. Bayside Land Co.*, 48 Cal App. 257, 191 P. 944, where the word "lewdness" in Penal Code Sect. 11225, was given broad significance so as to include all other immoral or degenerate conduct or conversation between persons of opposite sexes and was held not limited to "assignation" and "prostitution."

See also the dissent of Justice Herndon in *Harmer v. Tonylyn Productions Inc.*, 100 Cal. Rptr 576, 577-583 (Mar 2, 1972) and *People ex rel Hicks v. "Sarong Gal"* 103 Cal. Rptr 414 (Aug 3, 1972) (3) other states, like Ohio and Louisiana have adopted amendments which specifically includes places where obscenity is exhibited (O.R.C., Section 3767.01).

(C) OPERATION OF OHIO REVISED CODE, SECTIONS 3767 ET SEQ.

1. General

In Ohio, where the statutory language defining "nuisance" specifically encompasses a place where obscene films are exhibited, the operation of the statute in general is quite simple. Its constitutionality as applied to one motion picture film ("I Am Curious (Yellow)") was challenged in the federal system and upheld by a three-judge court in *Grove Press, Inc. v. Flask*, 326 F.Supp. 574 (March 10, 1970) (Celebrezze, Green, Batiste) see *Grove Press Inc. v. Flask* __ U.S. __, 37 L.Ed2d 1013, __S.Ct. . (June 25, 1973) vacated and remanded for further reconsideration in light of *Miller v. California* 413 U.S. 15, 37 L.Ed.2d. 419, 93 S.Ct. 207 (June 21, 1973). In *State of Ohio ex rel Ewing v. "Without A Stitch"* 37 Ohio St295, 307 NE2, 911 (Feb. 27, 1974) the Ohio Supreme Court also upheld its constitutionality. There the State Court discussed, at great length the operation of the Statute as a whole, as applied to the motion picture film, "Without A Stitch" and concluded at page 917:

> "It is interesting to note that six of those reasons were also raised and rejected by the federal district court in *Grove Press v. Flask*, supra, (326 F.Supp. 574).
>
> This court holds that R.C.3767.01 et. seq. prescribe a constitutionally permissible method of controlling the exhibition of obscene films."

While the *Flask* decision is now questioned by the three-judge court herein, where it attacks the operation of the statute at page 7:

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre

> can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film.....",

that objection is not well taken, in view of the interpretation given the statute by the Ohio Supreme Court in the *"Without A Stitch"* case (see page 102 infra). In the first place, the theatre cannot be shut down unless the trial judge is convinced from evidence that the public nuisance is *continuing* and presently exists. If for example, the public nuisance was found to exist solely on the basis of "I Am Curious (Yellow)" and such showing was not representative of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

This does not say, however, that the exhibition of one film alone cannot under the statute, be the proper basis for a judicial closing of a theatre for a year as a public nuisance. Take for example the hypothetical case of the Pussy Cat Theatre in Hollywood, California which regularly exhibits so-called "Adult Films", which any reasonable person would regard as being of the prosecutable variety. Suppose that on December 1, 1972, the Pussy Cat Theatre commences the public exhibition of a nationally known controversial 62 minute film showing nothing but oral copulation of the male penis in the mouth of a female (which act when publicly performed in California is a felony). The movie ad page advertising the film for December 1, 1972, is as shown on adjoining page 86 and describes the film only as "It". Thereafter criminal charges are filed, but nine months later that matter has not yet come to trial for a number of procedural reasons, such as attacks on the right to procure a copy for trial by subpoena or search warrant, etc. The news ad 5 months later on Apr. 20, 1973, is as shown on adjoining page 87 and reads "How Long? We will continue to show

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Mehta and Philharmonic End Japan Tour

MARTIN BERNHEIMER

San Diego Offers 'Medea' Premiere

OPERA REVIEW

Patricia Brooks Subs in 'Traviata' Role

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'Deep Throat' until you no longer care to see it." Seventeen months later on May 3, 1974, it is as shown on adjoining page 88. Does this Court have any serious doubt that a district attorney has an inherent right, independent of statute, as a representative of government to bring a *civil* action to abate the film itself as a public nuisance and, where the film is exhibited after the action is filed, and is still being shown when the trial judge finds that the same is a public nuisance, to require that the theatre be padlocked for a year.

The difference in the results reached in the "I Am Curious (Yellow)" and "Deep Throat" examples referred to above is obvious. To state a general rule which must follow from either hypothetical, as indulged in by the three-judge court herein is to fail to recognize the rule expressed by this court in *U.S. v. Raines, supra*, at a time when it should be applied. Does the "Deep Throat" fact situation noted above, affect the straw man constructed by the federal court reading:

> "Thus, upon a determination that as few as one or two films shown at a given theatre are obscene, the theatre can be ordered closed under this section for a period of one year regardless of the nature of any other films which the owner or operator may have intended to show during that period, with the burden on the owner to come into court and prove the non-obscenity of any such other film. . . ."?

Certainly, if the Federal District Court had considered the "Deep Throat" hypothetical and the subject matter therein involved, it would have had to restudy its hypothesis. The rule that a statute may be constitutional as applied to one set of facts, whereas it would be unconstitutional as applied to another set of facts is so well known as not to require citation of authority. During arguments on Mar 12, 1973, the three-judge court paid lip service to, but did not follow, that rule:

> "THE COURT: I am sure counsel is aware we can hold a statute constitutional, but unconstitutional as it being applied and that--well, the question before us is if that

was a constitutional section there, we still would also reserve the right to make the determination whether you are applying it constitutionaly. . . ." (T. page 19, lines 16-22.),

In the case herein, the Federal District Court's failure to apply that rule was error. See Memorandum in Support of Motion to Dismiss in *Pursue, Ltd. v. Huffman* (Appendix at pages O5-10 and Appendices P, Q and R).

2. *Ohio Revised Code Section 3767.04*

The action is commenced by the filing of a verified petition. R.C. Section 3767.04. Where the filing is by a citizen, a bond in the sum of not less than $500.00 is required to secure the payment of damages if such action is wrongfully brought. R.C. Section 3767.03. Upon the filing of the complaint, several discretions or options are given to the person upon whose relation the state action was brought, and to the trial judge, which if exercised, may result in other options (and also mandates). The person *may* or *may not* apply for a temporary injunction. If he does, the judge *must* grant a hearing within 10 days after the filing of the petition. Where the complaining party, *in his discretion, decides* to apply for a preliminary injunction, *he may also, in his own discretion,* apply for an ex parte restraining order to prevent the personal property and contents of the place from being removed until the court's ruling on the preliminary injunction. Where such application is made, the judge has a discretion and *may* or *may not* grant such restraining order. See R.C. Section 3767.04, which provides, in part, as follows: (see Appendix at page B-4)

> "After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within 10 days after the filing. Where such application for a temporary injunction is made, the court or judge thereof, may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nui-

> sance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. . . ."

The use of the term 'may' and 'shall' in the above context is quite clear. In the interpretation or construction of statutes, the primary and paramount rule is to ascertain, declare, and give effect to the intention of the Legislature if it is possible to do so. 50 Ohio Jur. 2d, Statutes, at page 139. In this connection see Black on Interpretation of Laws, 2nd Ed., at page 531, et seq.:

> "The words 'may,' 'authorized,' 'shall,' 'must,' and the like, as employed in statutes, are first of all to be presumed to have been used in their natural and ordinary sense, and they will be so understood unless such a construction would be obviously repugnant to the intention of the legislature, or would lead to some inconvenience or absurdity. It has sometimes been loosely said that 'may' and 'shall,' as used in statutes are interchangeable terms. But this is not correct. To convert such terms, the one into the other, at the mere will of the court, would be little short of substantive legislation. It is true that this may be done where it is imperatively necessary to prevent an irreparable mischief or an invasion of vested rights, and where the public interest or the fixed rights of individuals are concerned. But otherwise it is not permissible to put a forced or strained construction upon words of this character, to elevate merely permissive words into the force of a command, or to soften imperative expressions into a mere grant of license or authority.
>
> "Taken in its natural and ordinary sense, the word 'may' does not import a command, but merely signifies permission, ability, or possibility, and generally it denotes that the action spoken of is optional with the person concerned, or rests in the discretion of the court or body to which license or permission is given. And the word always re-

tains this primary meaning unless a different construction is necessary to give effect to the clear purpose and intention of the legislature, to make the statute accord with settled public policy, or to save the rights of parties in interest. For example, in a statute providing that whoever is found in a state of intoxication in a public place may be arrested without a warrant by a police officer, the language is permissive. It gives authority to the officers named to use their discretion in regard to making the arrest, considering all the circumstances of the particular case, but does not require them at all hazards to arrest such a person. But the word 'may' should be taken as equivalent to 'must' in all cases where it is evident that the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. And it is well settled that 'may,' in any statute, is to be construed as equivalent to 'shall' or 'must' when the public interests or rights are concerned, and when the public or third persons have a right de jure to claim that the power granted should be exercised.

"On the other hand, 'shall' and 'must' are words of command. Taken in their usual and proper meaning, they leave no room for choice or discretion, but are imperative; and they will be presumed to have been used in this sense, unless something in the character of the statute or the subject to which it relates, or in the context, shows that this could not have been the intention of the legislature."

The ex parte restraining order authorized by Section 3767.04, *if applied for* at the time of filing the application for a preliminary injunction, and *if issued* by the trial court, does not amount to a prior restraint of free speech. See *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970); *U.S. v. Little Beaver Theatre, Inc.*, 324 F. Supp. 120, 121 (Jan. 15, 1971); *Go v. Peterson*, 480 P.2d 35, 36 (Feb. 1, 1971), *Walter v. Slaton*, 182 S.E.2d 464, 467 (May 13, 1971).

Nor was it established for anything related to that purpose. The Legislature, in specifically authorizing the court to bring such contents within the court's jurisdiction, did so for the purpose of assuring that the special provisions established by the Legislature might be given effect, i.e., so that the forfeiture established by Section 3767.01(C) (which declared all such personal property and contents to be a nuisance) might be effective in carrying out the summary remedy afforded by Section 3767.06 (which provides for the sale of such personal property) and Section 3767.11 (which provides that the "proceeds of the sale of the personal property. . .shall be applied in payment of the costs of the action and abatement including the complainant's costs . . . .")

The third paragraph of Section 3767.04 sets forth in clear language what must follow where the complaining party establishes the right of the state to relief at the hearing on the preliminary injunction. That paragraph provides that the injunction *shall issue without additional bond* (a grant of authority which is uncommon in temporary injunction causes. See 29 O. Jur.2d, Injunctions §126 Bond or Other Security, at page 419). That paragraph provides, in part:

> "If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge *shall issue a temporary injunction without additional bond* restraining the defendant and any other person from continuing the nuisance. . . ." (Our emphasis.)

See Black on Interpretation of the Law, supra, as to the meaning of "shall".

The temporary injunction, authorized by O.R.C. Sect. 3767.04, operates in a dual capacity: both against the person of the defendants who are before the court, and against the property (the res), which is also before the court; (by posting a copy of the order on the premises). The "in personam" aspect is not an essential part of what is clearly an "in rem" statutory scheme, and should have been disregarded by the federal district court under the paramount rule of statutory construction which requires a court to give effect to the intent and purpose of the legislature.

In the next sentence of the same section, the Legislature accorded summary relief to the state against the real estate. Where the complainant at such hearing on the preliminary injunction establishes the fact of a public nuisance and the right of the state to a preliminary injunction, the court *is mandated thereby* to issue an *order closing the place against its use for* any purpose of lewdness until final decision is rendered on the application for a permanent injunction *unless "the person owning, in control or in charge of the nuisance so enjoined shows to the satisfaction of the court or judge that the nuisance complained of is abated."* The language of the statute is:

> "If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and *unless such person shows to the satisfaction of the court or judge that the nuisance complained of is abated,* or that such person proceeded forthwith to enforce his rights under Section 3767.10 of the Revised Code, the court or judge *shall forthwith issue an order closing the place against its use for any* purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. . . ." (our emphasis)

In *State of Ohio ex rel Ewing v. "Without A Stitch"*, supra the Ohio Supreme Court held the use of the word "shall" in R. C. sections 3767.05, 3767.06 and 3767.08 to impose a a manditory duty, at page 917:

> "Appellants contend that a trial court is not required to invoke every possible remedy provided in R.C. 3767.01 et seq. after finding a film to be obscene, and therefore the Court of Appeals erred in holding the remedies mandatory. However, an examination of the statutory language used in R.C. 3767.01 et seq. will show that the Court of Appeals was correct."
>
> "Upon a finding that a theater is exhibiting an obscene film R.C. 3767.05, 3767.06 and 3767.08 dictate the relief to be granted. Each statute uses the world "shall" to describe the duty of the trial judge to impose the various remedies stated therein, and this court has held that the use of the word "shall" in a statute must be construed as imposing a mandatory duty unless there appears a clear and unequivocal legislative intent that it receive a meaning other than its ordinary meaning. *Dorrian v. Scioto Conserv. Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834. Since no such legislative intent appears in R.C. 3767.01 et seq., the remedies imposed are mandatory."

Under the above closure provision, *the leasehold interest* where such public nuisance is conducted or maintained and *the personal property* and contents located and used *therein are to be forfeited* until final decision is rendered on the application for a permanent injunction *unless either of two conditions is shown to exist, namely:* (1) That the person "owning, in control, or in charge of the nuisance so enjoined. . ." *affirmatively* "shows to the satisfaction of the court. . . that the nuisance complained of is abated," or (2) That the lessor of such a place, being used by the tenant for the purpose of lewdness, affirmatively shows to the satisfaction of the court that he proceeded forthwith to void the tenant's lease as authorized by O.R.C. section 3767.10 and has regained possession of the premises.

O.R.C. section 3767.04 further allows the owner of any real property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction and regain possession of such real property by fulfilling three requirements; namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that he will immediately abate the nuisance and prevent the same from being maintained until decision by the court on the application for a permanent injunction and (3) Satisfying the court of his good faith. The statute also allows the owner of any personal property so restricted to appear at any time between the filing of the petition to abate the nuisance and the hearing on the application for a permanent injunction therein and to regain possession of such personal property by fulfilling two require-

ments, namely (1) Payment of all costs incurred, and (2) Satisfying the court of his innocence of any knowledge of the use of such personal property as a nuisance and that with reasonable care he could not have known thereof.

At the time of the trial judge's ruling in the Common Pleas court below, on Oct. 24, 1972, granting the temporary injunction it was clear, beyond doubt, that absolute judicial restriction at this point of the proceeding - after trial on the merits - was entirely proper. The right of a state court system to impose a judicial restraint by way of preliminary injunction after a hearing on the merits, is no longer a debatable issue. The constitutional requirement for a "prompt final judicial decision" referred to by this court in administrative prior restraint cases such as, *Marcus v. Search Warrants*, 367 U.S. 717, 6 L.Ed.2d 1127, 81 S.Ct. 1708 (June 19, 1961); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed2d 809 (June 22, 1964); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (Mar. 1, 1965), and *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed.2d 966, 88 S. Ct. 754 (Jan. 29, 1968), had reference to a speedy determination *by a trial court* as distinguished from a prior restraint applied in administrative proceedings. If the language and reference of this court in *Teitel Film* at page 969 to "prompt final judicial decision by the trial court":

> "... The Chicago censorship procedures violate these standards in two respects. .. (2) the absence of any provision for a *prompt judicial decision by the trial court* violates the standard that. . .the procedure must also assure a prompt final judicial decision . . . ." (our emphasis.)

was not clear, that issue was laid to rest in *Interstate Circuit Inc. v. Dallas* 390 U.S. 676, 20 L.Ed 2d225, at 235, fn22, 88 S.Ct. 1298 decided on Apr. 22, 1968 of the same term of court.

> "22. Appellants also assert that the city ordinance violates the teachings of *Freedman v. Maryland, supra, because it does not secure prompt state appellate reveiw. The assurance of a 'prompt final judicial decision'* (380 U.S. at 59, 13 L.Ed.2d at 655) *is made here, we think, by the guarantee of a speedy determination in the trial court* (in this case nine days after the Board's classification). *see Teitel Film Corp. v. Cusack*, 390 U.S. 139, 19 L.Ed. 2d 966, 88 S.Ct. 754. . . ." (our Emphasis.)

The *Interstate Circuit* decision gives a crystal clear understanding of what this court meant in *Freedman* by "prompt, final judicial decision." The court is *not* making an issue out of the time period which is expended in carrying out the appellate review. That was one of the issues in the *Interstate Circuit* case. See the Jurisdictional Question and Arguments of Appellant Interstate Circuit in their brief on the merits at pages 3, 20 and 21. See also *U.S. v. 37 Photographs*, 402 U.S. 363, 91 S. Ct. 1400, 28 L.Ed.2d 822, at pages 830-833 (May 3, 1971), which authorizes actual prior restraints by way of court order for a reasonable period of time in advance of a final determination of the obscenity issue by the *trial court* in Federal Customs cases.

That the judicial restraint may be applied after an adversary hearing at the *preliminary injunction* stage does not raise any additional procedural issues for, as authorized by Civil Rule 65(B) (2), the Ohio Trial Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

After the decision went against Cinema I Theatre and William Dakota in the trial court and the preliminary injunction was issued, the losing litigants had an option as operators and "the person owning, in control, or in charge of the nuisance so enjoined". They could have shown "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court was not required to close the place against its use for the "lewdness" which had been found to exist. It seems clear to appellants herein that, in a fact situation where the only nuisance involved would be one particular film, had testimonial evidence been given by the person "in control or in charge of the nuisance" that the same had been terminated, a proper ruling would have been such as was handed down by the trial court in *Bertrand De Blanc v. Courville*, Docket No. 46743-1/2,

15th Judicial District Court, LaFayette Parish, La., which abated the film, "The Minx," under a similar Louisiana statute. That court held as follows:

> "It is further ordered that the rule of the District Attorney be made absolute and accordingly that the writ of injunction issued be perpetuated and that the building known as Center Cinema Theatre and the contents thereof, to-wit, the motion picture film known as The Minx are declared to be a nuisance and that the defendants, Ogden Perry Theatre, Inc., and Jules J. Courville, be and they are enjoined and restrained from committing and permitting further acts of obscenity as defined by RS 14:106, including the showing of the motion picture film The Minx in said building.
>
> "It is further ordered that an order of abatement be issued ordering the effectual closing of the building and the premises housing said building and prohibiting its use for any purpose for a period of one year from the date of the filing of this suit *unless all costs of these proceedings be paid and a bond be furnished in accordance with the law and approved by the court.*
>
> "It is further ordered in compliance with the statute that the said defendants be permanently enjoined and restrained from carrying on and conducting such a nuisance anywhere in the State of Louisiana. . . ." (our emphasis.)

That the construction given this type of abatement statute by the LaFayette, Louisiana, trial court is a reasonable interpretation, see 20 Columbia Law Review at page 608, commenting on the intent behind such abatement statutes as originally drafted:

> "Fundamentally this legislation is preventive and not penal. For although the order for abatement prescribes the closing of the premises and the sale of the personality found therein, nevertheless the premises and property are almost invariably subject to release upon the payment of costs by the owner and upon filing of sufficient security to insure good behavior. In reality the injunction and abatement together merely serve to bind the defendant over to keep the peace. . . ."

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were, as here, that the operator had exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to accept the testimonial evidence offered by such operator as meeting his burden of proof, i.e., "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony would be to perpetuate a fraud on the court. See also page 85.

3. Ohio Revised Code Section 3767.06

Under O.R.C. Section 3767.06, the Common Pleas Trial Court's final judgment of Nov. 30, 1972 does not foreclose the errant litigants from acquiring the right of reentry and repossession. The court order read "is ordered closed for any purpose for a period of one year unless sooner released by Order of this Court pursuant to defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio." (Appendix, page I-6). The trial court was following Section 3767.06 which provides the following mode of relief:

> "3767.06. Content of judgment and order. If the existence of a nuisance is admitted or established in an action as provided in Sections 3767.01 to 3767.11, inclusive, of the Revised Code. . . an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as pro-

vided in Section 3767.04 of the Revised Code, and shall direct the sale of such thereof as belong to the defendants notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property, as provided in Section 3767.04 of the Revised Code, or, if not so furnished shall continue for one year any closing order at the time of granting the temporary injunction, or, if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and keeping it closed for a period of one year *unless sooner released. The owner of any place closed and not released under bond may then appear and obtain such release in the manner and upon fulfilling the requirements provided in Section 3767.04 of the Revised Code."* (our emphasis.)

Section 3767.06 operates to allow the owner of any real property so restricted to reenter and regain possession of such real property after such order of abatement by fulfilling three requirements, namely (1) Payment of all costs incurred; (2) Filing a bond as owner of such real property conditioned that such person will immediately abate the nuisance and prevent the same from being so kept for one year from the final order of abatement, and (3) Satisfying the court of his good faith. It also allows the owner of any personal property so restricted to regain possession of the same, if claimed within 10 days after such final order of abatement, by fulfilling two requirements, namely, (1) Payment of all costs incurred, and (2) Proving, to the satisfaction of the court, innocence of any knowledge of said use thereof, and that with reasonable care and diligence he could not have known thereof.

In commenting on the ameliorating provisions of the statute as they apply in a case where the trial had progressed to the permanent injunction stage, the Ohio Supreme Court in *Ohio ex rel Ewing v. "Without A Stitch", supra*, held as follows at page 917:

"(8, 9) There are four remedies contained in R.C. 3767.01 et seq. which must be invoked upon a finding that a theater is a nuisance as defined in R.C. 3767.01(C).

"First, R.C. 3767.05 provides that the trial court enter a judgment perpetually enjoining defendants from maintaining the nuisance. In this case, the nuisance was the showing of the particular film declared to be obscene. Since R.C. 3767.05 mandates an immediate cessation of exhibiting the film, the trial court erred in permitting appellants to continued showing "Without A Stitch" pending appeal.

"Second, R.C. 3767.08 requires the imposition of a three hundred dollar tax upon the nuisance and against any person maintaining it. The nuisance in a case involving a theater is defined by R.C. 3767.01(C) to include not only the theater itself, but also the real property upon which it is located and the personal property used in conducting the nuisance. The question of what specific personal property is encompassed by the use in R.C. 3767.01 et seq. of the phrase, "personal property and contents" used in conducting and maintaining the nuisance, has not been raised in this case, and we need not answer it. As noted in our discussion under issue II, *Smith v. California, supra* (361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205), interpreting the First and Fourteenth Amendments, requires knowledge of the contents of the film on the part of the person against whom the tax is sought to be imposed as a precondition to the imposition of such a tax.

"The third mandatory remedy is found in R.C. 3767.06. It requires the removal and sale of all personal property used in conducting the nuisance. However, the owner of such personal property is permitted to escape the sale order by coming into court within ten days after the abatement order is filed and showing that he had neither actual nor constructive knowledge that his property was being used to maintain a nuisance.

The fourth remedy is also contained in R.C. 3767.06. One part of the statute dictates that the abatement order include an order closing the place, in and upon which the nuisance was maintained, for a period of one year. R.C. 3767.06 states that the closing pertains to the use of the property "for any purpose." However, this harsh penalty is ameliorated by permitting the owner to obtain a release from the order by complying with the release provisions of R.C. 3767.04. Those provisions require that the closing order must be released if the owner appears in court, pays the costs incurred in the action, files a bond in the full value of the property, and demonstrates to the court that he will prevent the nuisance from being reestablished. The nuisance is the exhibition of the particular film declared obscene. The release provisions do not, as appellants contend, require the owner to show that no film to be exhibited during the one-year period will be obscene. Such a requirement would not only be impossible, as a practical matter, but also would be an unconstitutional prior restraint on an activity generally protected by the First Amendment. *Freedman v. Maryland, supra* (380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649); *Speiser v. Randall, supra* (357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed2d 1460). The language of R.C. 3767.06 does not require a construction which would render the one-year closing provision unconstitutional, and this court will not so construe it.

4. Statutory Construction

Appellants submit that under rudimentary principles of constitutional law, Appellee is limited in its attack on the constitutionality of the statute to the specific manner in which it was applied in this case. They cannot complain that in the future it may be unconstitutionally applied to others. See *United States v. Raines*, 362 U.S. 17, 21 (1960):

> "Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly

> it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

A broad attack on the Ohio Nuisance Statute, similar to that made by respondent herein, was made and rejected by a three-judge federal district court in *Grove Press, Inc. v. Flask*, 326 F. Supp. 574, 579 (Mar. 10, 1970). Vacated and remanded on other grounds in ____ U.S. ____ (June 21, 1973). The public policy which prevented Grove Press's broad attack should also defeat appellee's broad attack, which comes from the opposite end of the spectrum.

The construction given to the statute by the three-judge court below failed to take into consideration the fact that O.R.C. Section 3767, et seq., is a statute involving the public welfare. In the latter case, courts have always applied a liberal construction in favor of the public and a strict construction against those whose interests are adverse thereto. See 50 Ohio Jr.2d, Public Welfare, Section 24, at page 226:

> "Section 241. *Public Welfare* - It is a well established doctrine that every public statute has, or is supposed to have, as its objective some purpose or policy whereby the public welfare is served. The Legislature will be presumed to have enacted laws for the public good, and, therefore, where there is a strong interest relating to the public good or general welfare designed to be conserved by the statute, the courts, in interpreting it, apply a liberal construction in favor of the public and a strict construction against those whose interests are averse thereto. Indeed, it has been declared that in our form of government the only excuse for legislative enactment is that it will serve the public. Accordingly, in the interpretation of an ambiguous statute, a construction should be favored which is 'safe to the state' and the citizens thereof. Where a reasonable interpretation can be given to it which will make it operate for the welfare of the general public, as distinguished from the welfare of certain individuals, groups, or classes of individuals, the courts, in construing a statute, will not impute to the legislature the unworthy purpose of having intended

to enact a law for the benefit of certain individuals, groups, or classes of individuals, as distinguished from the public. . . ."

Appellants herein would ask the rhetorical question: "Of what significant difference is it, in reference to the intent of the Legislature or the public good, that only one obscene film should be played in a particular theatre for nine weeks (or indefinitely) by its pandering owners and not nine of such films for each of nine consecutive weeks?" (See, also, remarks at page 85).

Seizure and destruction or confiscation of the instruments of ascertaining wrongdoing expresses a resort to a legal remedy sanctioned by the long history of Anglo-Saxon law. *Ohio ex rel Bell v. Mahoning Valley Distributing Agency, Inc.*, 169 N.E.2d 48, at 66, affirmed in 186 N.E.2d 631, at 632; *Wisconsin v. Voshart*, 159 N.E.2d 1, 8 (June 7, 1968); Modern Constitutional Law, Antineau, Vol. 1, at Sec. 3.9. *One Lot of Emerald Cut Stones and One Ring v. U.S.* 409 U.S. 232, 34 L.Ed.2d. 438, 93 S.Ct. 489, (Dec. 11, 1972.) *Calero-Toledo v. Pearson Yacht Leasing Co.* ____ U.S. ___ decided May 15, 1974.

The views of this Court on the seizure of obscene materials as contraband and their forfeiture as such are clearly stated in *U.S. v. Reidel*, 402 U.S. 351, 28 L.Ed. 2d 813, 91 S.Ct. 1410 (May 3, 1971), and *U.S. v. Thirty-seven (37) Photographs*, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971). The decisions in *Reidel* and *Thirty-seven (37) Photographs* reaffirm the principles stated above in *Kingsley Book, Inc. v. Brown supra.*

The view of this Court on forfeitures of property used in illegal activities is set forth in *U.S. v. U.S. Coin and Currency*, 401 U.S. 715, 28 L.Ed.2d 434, 91 S.Ct. 1041, decided on April 5, 1971. In that case, Justice Harlan writing for a majority of five, stated at page 438:

"If we were writing on a clean slate, this claim that § 7302 operates to deprive totally innocent people of their property would hardly be compelling. Although it is true that the statute does not specifically state that the property shall be seized only if its owner significantly participated in the criminal enterprise, we would not readily infer that Congress intended a different

meaning. Cf. Morissette v. United States, 342 US 246 96 L Ed 288, 72 S Ct 240 (1952). *However, as our past decisions have recognized, centuries of history support the Government's claim that forfeiture statutes similar to this one have an extraordinarily broad scope.* See Goldsmith-Grant Co. v. United States, 254 US 505, 65 L Ed 376, 41 S Ct 189 (1921); United States v. One Ford Coupe, 272 US 321, 71 L Ed 279, 47 S Ct. 154, 47 ALR 1025 (1926). Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. See Dobbins's Distillery v. United States, 96 US 395, 399-401, 24 LEd 637, 638 (1878); The Palmyra, 12 Wheat 1, 14, 6 L Ed 531, 535 (1827). Simply put, the theory has been that if the object is 'guilty,' it should be held forfeit. In the words of a medieval English writer, 'Where a man killeth another with the sword of John at Stile, the sword shall be forfeit as deodand, and yet no default is in the owner.' The modern forfeiture statutes are the direct descendants of this heritage, which is searchingly considered by Mr. Justice Holmes in a brilliant chapter in his book, The Common Law. The forfeiture action in the present case was instituted as an in rem proceeding in which the money itself is the formal respondent. . . ." (our emphasis.)

See also *One Lot of Emerald Cut Stones* and *One Ring v. U.S.* 409 U.S. 232, 34 L.Ed.2d. 438, 93 S.Ct. 489 (Dec. 11, 1972) where this Court said at p. 442:

"If for no other reason, the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments, "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the Double Jeopardy Clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense." *Helvering v. Mitchell*, supra, 303 US, at 399 82 L.Ed. 443, 63 S.Ct. 379 (1943)."

and at page 443:

(10, 11) "The § 1497 forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigating and enforcement expenses. In other contexts we have recognized that such purposes characterize remedial rather than punitive sanctions. See *Helvering v. Mitchell, supra*, 303 US at 401, 82 L.Ed. 917 *Marcus v. Hess, supra*, 317 US, at 549-550, 87 L.Ed. 443, *Rex Trailer Co. v. United States*, 350 US 148, 151-154, 100 L.Ed. 149, 76 S.Ct. 219 (1956). Moreover, it cannot be said that the measure of recovery fixed by Congress in § 1497 is so unreasonable or excessive that it transforms what was clearly intended as a civil remedy into a criminal penalty. *Rex Trailer Co. v. United States, supra*, 350 US, at 154, 100 L.Ed. 149. See *Murphy v. United States*, 272 US 630, 71 L.Ed. 446, 47 S.Ct. 218 (1926); *Marcus v. Hess, supra*.

"Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings . . . . In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Helvering v. Mitchell, supra*, 303 US, at 400, 82 L.Ed. 917."

(D) TWO THREE-JUDGE FEDERAL DISTRICT COURTS IN THE STATE OF OHIO (NORTHERN AND SOUTHERN DISTRICTS) ARE UNANIMOUS IN THEIR DISAGREEMENT AS TO THE FACIAL VALIDITY OF OHIO REVISED CODE SECTIONS 3767.01 ET SEQ.

In support of what has heretofore been stated, appellants would invite this Court's attention to the very recent decision of a Three-Judge Federal District Court in the Southern

District of Ohio, Western Division (Peck, Porter and Hogan) in *Cincinnati Properties Inc. v. Simon Leis* ___ F. Supp. ___(May 2, 1974). In that case, the court came to an opposite conclusion from that reached by the Three-Judge Court below (Celebrezze, Young and Walinski), holding at page 10 of the Court's per Curiam Opinion:

"The padlocking provision of the Ohio Statute is a time honored remedy involving the place - it is not censorship or prior restraint. . ."

A copy of the decision in *Cincinnati Properties Inc. v. Simon Leis*, supra, is reprinted herein at Appendix A.

VIII

TO PERMIT FEDERAL INTERFERENCE IN OBSCENITY LITIGATION, BY WAY OF DECLARATORY RELIEF, WOULD CONTROVERT THE POLICY EXPRESSED BY THIS COURT IN MILLER v. CALIFORNIA.

(A) The law expressed by this court in *Steffel v. Thompson* has the practical effect of repudiating this court's policy of limiting federal interference in state court actions. *Steffel* should be narrowly limited or discarded.

In *Younger v. Harris* 401 U.S. 37 and its companion cases, Justice Black, speaking in the background of a court docket loaded with federal interference cases, expressed a strong policy favoring principles of federalism. As applied to declaratory judgments, that policy of non interference in criminal prosecution's was voiced in *Samuels v. Mackell* 401 U.S. 66, 27L.Ed.2d. 688 at 694, 91 S.Ct. 674 as:

"We can perceive no relevant difference between the two situations with respect to the limited question whether, in cases where the criminal proceeding was begun prior to the federal civil suit, the propriety of declaratory and injunctive relief should be judged by essentially the same standards. In both situations

deeply rooted and long settled principles of equity have narrowly restricted the scope for federal intervention, and ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the long-standing policy limiting injunctions was designed to avoid. This is true for at least two reasons. In the first place, the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce by granting 'further necessary or proper relief,' 28 USC § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 USC § 2283, and thus result in a clearly improper interference with the state proceedings. Secondly, even if the declaratory judgment is not used as a basis for actually issuing an injunction, the declaratory relief alone has virtually the same practical impact as a formal injunction would. As we said in the Wycoff case, 344 US. at 247, 97 L.Ed. at 298:

> 'Is the declaration contemplated here to be res judicata, so that the (state court) cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State (court) before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.' "

Justice Black having left the Court, a new policy appears to be emerging which forebodes additional rough sledding for law enforcement efforts.

Appellants submit that, in practical operation, *Steffel v. Thompson* __U.S. __, 39 L.Ed.2d. 505, 94 S.Ct. __ decided by this court on March 19, 1974, can be expected to be employed by defense attorneys in a manner which will undermine the spirit of *Younger et al*, and enable federal district courts to accomplish indirectly that which *Younger*

supra, and *Mackell*, supra, sought to avoid. See *Steffel*, supra, at page 513, footnote 7, and page 517. It would appear that *Steffel* presents an open invitation to prospective defendants and defense attorneys to participate in a race to the court room, so as to engage the State on two fronts. That court room encounter can be broadened to as many "fronts" as there are divisions of the federal court room system within the State. The diversified preliminary results which can be expected from the separate divisions (See Point VII (D) at page 106) can be further confused by conflicting rulings between judges within the same Court. (See footnote 3 on page 30). If that were not bad enough, additional plaintiffs can now be manufactured so as to increase the odds for a favorable result in this game of Russian Roulette.'[14]

In the short period since *Steffel* was decided, this court has already been faced with one case in which this latter conflict has been suggested. In *Allee v. Medrano* ___.U.S. __ (May 20, 1974), Chief Justice Burger presented the problem in his separate opinion, namely; whether an organizational plaintiff, against whom there is no "pending" state action, can use the "pending" action against its members to show a threatened state action against itself and obtain Declaratory Relief. The Chief Justice concluded that, contrary to *Younger*, such would allow the Federal Court to decide the rights of the organization, and effectively those of its members:

> "Any other result would allow the easy circumvention of Younger by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from *Younger* burdens."

[14] The attention of this Court is invited to the manner in which Federal District Judges Ferguson, Ely and Circuit Judge East used Steffel to undermine the legitimate efforts of California law enforcement to stop the exhibition of "Deep Throat" in Orange County. See their decision rendered on June 4, 1974 in Miranda v. Hicks ___ F. Supp __ , a copy of which is attached at appendix B.

(B) *Miller v. California* Precludes The Application of *Steffel v. Thompson* to Obscenity Litigation.

Until *Steffel* was handed down, it was to be expected that, based solely upon this Court's rulings in *Younger* and *Mitchum* (and independent of other arguments made herein), Appellee Pursue Ltd. should have a difficult time presenting an arguable basis for federal relief of any kind. This Court's decision on March 19, 1974 raises an additional issue. Can a Pursue type organizational plaintiff now pull over itself the cloak of "Steffel" and, with its argument of "threatened state action", sneak into a Federal court room, through doors which had previously barred its entry.

The rule of law formulated by this court in *Miller v. California* effectively precludes the application of *Steffel* to obscenity litigation. Under *Miller* the states are to be the *first* to define what specific sexual conduct is to be proscribed under state law as written or "authoratatively construed." Were the federal courts to be allowed to apply that construction, the status of obscenity litigation would be returned to the same position it occupied before *Miller, and* would effectively prevent the application of local standards.

CONCLUSION

Wherefore, appellants pray:

(1) That the order of judgment entered on April 20, 1973 in *Pursue Ltd. v. Lawrence S. Huffman* CIV No. 72-432 be reversed and that said action be dismissed for failure to state a claim upon which federal relief can be based.

(2) That *State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota et. al.* 72 CIV 0326 be ordered remanded back to the Court of Common Pleas of Allen County, Ohio to permit appellants to execute the final judgment of said court, entered on Nov. 30, 1972.

June 6, 1974 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day of June, 1974, copies of the Brief for Appellants and the Appendix were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

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Appendix A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CINCINNATI PROPERTIES, INC. d/b/a/ Monte Vista Theater, Plaintiff, v. SIMON LEIS, et al., Defendants.	)	Civil Action No. 8471
STANLEY MARKS, Plaintiff, v. SIMON LEIS, et al., Defendants.	)	Civil Action No. 8714
TERRY L. BARNETT, et al., Plaintiffs, v. SIMON L. LEIS, JR., et al., Defendants.	)	C I 74-112
MONTY EMERY, Plaintiff, v. SIMON L. LEIS, JR., et al., Defendants.	)	C I 74-128

MEMO DECISION

Before Peck, Circuit Judge, and Porter and Hogan, District Judges.

Per Curiam

These cases, with the consent of all the parties, have been consolidated. In each of them the question of the

constitutionality (or the constitutionality as applied) of the Ohio "Nuisance" laws (O.R.C. 3767.01, et seq.) is involved, generally. Cross motions for summary judgment were filed in 8714 addressed to a common question (which motions have been briefed and argued and are herein considered).

In each of the cases this Court is asked to enjoin the abatement provisions of the Ohio statutes in the area of obscenity as violative of the First Amendment. Three of the consolidated cases involve Adult Bookstores (offering books, pamphlets and, in addition, so-called Peep Movies). One (8471) involves a movie house.

Civil Action 8714 was preceded by an action instituted under the Ohio statutes in the Hamilton County Common Pleas Court against the operator of three book stores and the owners of the real estate involved. A restraining order issued in the State Court action against the removal of any property from the locations pending the taking of an inventory The inventory was promptly taken. Thereafter the restraining order was dissolved and operations were renewed. Civil No. 8714 was filed in this Court at that stage (to enjoin further proceedings in the state case) and the state case is in status quo by agreement of the parties pending decision by this Court on the pending motions. Prior to the filing of the action in the Common Pleas Court, the plaintiff had "sampled" the offerings of the stores and evidence of some 51 samplings (books, magazines, pictures (stationary and movie)) were filed with the state complaint. By stipulation of the parties to 8714, it is agreed that the samplings are each de facto and de jure obscene, under any test - whether Miller (Miller v. California, 413 U.S. 15 (1973)) or pre-Miller.

In 74-128 (Emery) the proceedings have progressed further. One Adult Bookstore is involved, called "Sin City." It has been in operation for several months during which time various law enforcement officers have entered and sampled the offerings (magazines and films). These films and magazines (11 in number) are specifically named in the complaint filed in the Common Pleas Court and the same stipulation as to obscenity applies to that case. An inventory was taken and the case was tried on the merits in the Common Pleas Court. It is important to note that prior to the merit hearing in that court there was no significant interference with the Bookstore's business, i.e., there was no significant restraint prior to a fully noticed and adversary judicial hearing. There is no doubt that the "samples" were representative - at least the parties are in agreement that hundreds of other books and pamphlets and significantly additional movies (in addition to the 11 specific) were in the inventory of the operator. The State Court, as a result of that hearing, concluded that a "nuisance" existed at the location, ordered its "abatement," ordered the place involved "padlocked" for a year, but extended to the owner the statutory opportunity of retaking possession upon giving bond.

In 8471 a movie house is involved. The two movies exhibited at one performance furnished the basis for the abatement action in the State Court. On a finding of obscenity with respect to these movies, a nuisance judgment issued including an abatement and one year "padlock" order. This Court temporarily enjoined the closing. Temporary injunctions have been denied in the bookstore cases.

A brief description of the Ohio Nuisance statutes (O.R.C. 3761.1, et seq.) is appropriate. A "nuisance" includes "any place....in which or upon which lewdness.... is conducted....or upon which lewd or obscene films....are shown" and includes the personal property used in connection with conducting the nuisance. Either a private person or the prosecuting attorney may bring an action to abate the nuisance and enjoin its maintenance. Upon the filing of a complaint the State Court may issue a restraining order preventing removal of any property from the place and the Sheriff is required, if such order issues, to forthwith inventory the personal property in the location. A hearing for temporary injunction purposes is provided for, which may be combined with a merit hearing. This much appears clear - except for the restraint for inventory purposes, there is no seizure nor any interference, nor any suppression of any speech or ideas until a judicial hearing. The hearing provided for is a prompt one (within 10 days and on 5 days' notice).

The section of the Ohio law which is most directly involved in these cross motions is that dealing with the decree upon a merit hearing by the State Court. The statute provides that if the existence of the nuisance be established the final decree "shall include an order directing the effective closing of the place against its use for any purpose [1/] and keeping it closed for a period of one year unless sooner released....the owner may then appear and

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1/ As applied to a book store - since such an order prevents the sale of books, for instance, in addition to those sampled and the subject of specific obscenity findings by the State Court, this provision is claimed to be an illegal "prior restraint."

obtain" a release under a bond "conditioned upon the abatement of the nuisance and preventing the same from being established." As recently construed by the Ohio Supreme Court, as applied to movies, these conditions do not "require the owner to show that no film to be exhibited during the one-year period will be obscene....such a requirement would be an unconstitutional prior restraint." State, ex rel v. Film, 37 Ohio St.2d, at 105 (1974).

The parties are all in agreement that the narrow question before us is whether or not the abatement and closing (for a year) provisions of the Ohio statute are constitutional.

The plaintiffs' claim for relief is based on four grounds. The first is that the Ohio courts are applying or will "over-broadly" apply the nuisance section in that the Chapter, as such, applies only to motion picture films. However (a) the operator is, in each instance, or was, at the time pertinent, exhibiting a film, and (b) at least where the construction is arguable, it is one for the Ohio Courts and the Ohio Courts have construed the section as applicable to books and pamphlets, as well as to films.

The second ground is stated in terms of retroactivity and in short is this: That the decision in Miller, 413 U.S. 15 (1973), changing the standard set forth in Memoirs, 383 U.S. 413 (1966), effectively "scrapped" all previously passed state obscenity statutes (and with them nuisance statutes based thereon). Or, to put it another way, the plaintiffs claim (a) that the Ohio statutes in question, by judicial interpretation, incorporated the definitions set forth in Memoirs (and see State v. Mazes, 7 Ohio St.2d 136 (1966)); (b) since Miller changed the constitutional test,

the Ohio statutes are necessarily vague and overbroad (at least until redefined by the courts or the legislature). The answer to that is that the Supreme Court indicated to the contrary when, in 1973 and after Miller, THE COURT remanded a number of cases then pending before it to trial courts to give those courts the opportunity to determine the obscenity questions involved consistent with the opinion in Miller. (Cf. State, ex rel v. Vixen, 35 Ohio St.2d 215 (1973)

The third ground is that the statutes, as written, necessarily are unconstitutional as a prior restraint on presumptively protected First Amendment material and the fourth is that if there be any doubt of that, the doubt is removed by the application of the statutes by the Ohio courts. In that connection this consolidated proceeding does indicate on its face that there have been at least two applications of the statutes by the local state courts. In the one (8471 - Monte Vista) a movie house was closed or padlocked for a year and the owner refused access to the premises for any purpose and under any conditions. This Court enjoined the enforcement of that order. In the other (C 1 74-128 - Emery) a book store has been ordered padlocked (closed) for a period of one year. The order afforded to the owner the bond opportunity. The conditions of the bond, as stated in the order, complied with the statutory construction adopted by the Ohio Supreme Court in State, ex rel v. A Film, 37 Ohio St.2d, at 105. Specifically, the conditions would be broken only by the commission of a future nuisance consisting of the sale or exhibition of some or all of the materials as had theretofore and in the abatement proceeding been judicially determined by the State Court to be obscene. The facts in

74-128 furnish a fair foundation for the plaintiffs' applied argument. (The State Order involved in 8471 does not - it went contra to the statute and contra to the construction subsequently placed upon the statute by the Ohio Supreme Court.)

The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concededly presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may, of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the states have power to prohibit obscenity and, within the Miller limits, to determine what is and is not. Kingsley v. Brown, 354 U.S. 436 (1967); United States v. Reidel, 402 U.S. 351 (1971); Miller v. California, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide a criminal sanction. The falacy of the plaintiffs' position is somewhat indicated

by this simple example: A person possessing for sale one copy of one book concededly obscene and ten copies of a concededly non-obscene book is imprisoned for the former - during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials.

From time immemorial states have chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance." The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity.

The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in

Kingsley, at p. 441, "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: 'What is needed,' writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.'"

The constitutional power of the State to abate what has been appropriately defined as a public "nuisance" has never been seriously questioned. "Padlock" remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from Kingsley, at page 441, the Supreme Court, speaking in the area of dissemination of pornography, said:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. (Underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice."

Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, "All places where intoxicating liquors are....

sold....are declared to be common nuisances and upon the judgment of any court....finding such place to be a nuisance under this section, the sheriff....shall be directed to shut up and abate such place...." The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality, said:

> "The State, having authority to prohibit the.... sale of intoxicating liquors....we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes....The statute does not put the brand of a common nuisance upon any place, unless....that place is kept and maintained for purposes declared by the legislature to be injurious to the community." (Underscoring ours.)

The padlocking provision of the Ohio statute is a time honored remedy involving the place - it is not censorship or prior restraint.

A proposed order, consistent herewith, may be presented, dismissing the complaints, except for the Monte Vista case - 8471. (A case similar in every respect to Monte Vista is pending in the Supreme Court on appeal from the Northern District of Ohio, and the Monte Vista case will remain in status quo pending the determination of that appeal.)

John W. Peck, Circuit Judge

David S. Porter, District Judge

Timothy S. Hogan, District Judge

Appendix B

Decision of Three Judge Federal District Court in Miranda v. Hicks ___F. Supp. ___(June 4, 1974) relying upon Steffel v. Thompson 39 L. Ed2d 505 (March 19, 1974) to avoid federal non-interference rule mandated by the Younger v. Harris 401 U. S. 37 (Feb. 23, 1971).

Thursday, June 6, 1974 THE LOS ANGELES DAILY JOURNAL

Complete Text of Decision Upsetting Obscenity Statute

The Los Angeles Daily Journal today is publishing the full opinion of the three-member federal judge panel upsetting California's obscenity statute.

As reported in yesterday's paper the court in a precedent-setting opinion held in Miranda v. Hicks, Civ. 73-2775-F, that California's obscenity statute, Penal Code Sec. 311, violates the U.S. Supreme Court decision in Miller v. California.

The court ruled in favor of the Pussycat Theatres in their attempt to show the film "Deep Throat."

Plaintiff's were Vincent Miranda, doing business as Walnut Properties; and Pussycat Theatre Hollywood, a California Corporation.

Defendants were Cecil Hicks, district attorney of the County of Orange; Oretta Sears, deputy district attorney of the County of Orange; Dudley D. Gourley, chief of police of the City of Buena Park County of Orange; Arthur Frontecchio, Richard Hafdahl and Daniel Harrison, officers of the Police Department of the City of Buena Park.

The federal court panel was made up of Judge Walter Ely, circuit judge and Judges William G. East and Warren J. Ferguson, district judges.

The per curiam opinion reads as follows:

The primary issue presented is whether the California obscenity statute as interpreted by the state courts of California meets the constitutional standards mandated by the Supreme Court in Miller v. California, 413 U.S. 15 (1973). We hold that it does not.

The facts which give rise to the litigation are as follows:

1. On November 20, 1973, anticipating that the movie "Deep Throat" would be exhibited in the City of Buena Park, in Orange County, California, three members of the Buena Park Police Department traveled to nearby Los Angeles County and there viewed the film in its entirety.

2. On November 21, 1973, an affidavit and warrant were prepared describing the film, and arragements made for a judge of a Municipal Court to view the film if it was brought to Buena Park.

3. At 12:30 p.m. on November 23, 1973, the officers, a deputy district attorney and the judge attended a showing of the film at plaintiff's theatre in Buena Park.

4. After viewing about 45 minutes of the film, they retired to the sidewalk in front of the theatre, where the judge was presented with the previously prepared documents.

5. A photographer hired by the theatre began photographing the judge and the officers while they reviewed the papers. One of the officers, acting on orders from the judge, stopped the photographer from taking any more pictures and seized the film in his camera.

6. The search warrant was issued, and the officers seized the movie and posters advertising it. In describing the property to se seized, the warrant also contained the following handwritten addition:

"Money contained in the ticket booth & specifically for a $20.00 bill Ser. No. B08574869B."

All the cash in the box office was seized, an amount shown to be $305.00.

7. That afternoon the theatre obtained another copy of the film for exhibition. At 3:00 p.m., the same police officers again viewed the film, and left to get another warrant. The affidavit accompanying the second warrant was an identical copy of the first, but also contains the following handwritten notation:

"Your affiant further states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. after being viewed by Judge —— with the exception of certain portions being edited different than the first film seized.

Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse and numerous small changes at different portions of the film."

8. The same Municipal Court judge signed the second warrant without seeing the film again, and the officers returned to the theatre at 4:30 p.m. Another copy of "Deep Throat" was seized, along with some advertising posters.

Please turn to page 8

Continued from Page 1

9. The typed second warrant was also an identical copy of the first, but contained the following handwritten addition in describing the property to be seized: "Money contained in the ticket booth cash drawer." $159.00 in cash was seized from the box office.

10. The theatre obtained yet another copy of "Deep Throat." At 7:45 p.m. the same day, the same officers again returned to the theatre and viewed the film in its entirety. They then contacted the judge, who signed another search warrant at 9:00 p.m. The affidavit in support of the warrant was identical to the first and second, but contained the following handwritten notation:

> "Your affiant states that said film was seized on Nov. 23, 1973 at approx. 1:30 p.m. and 4:35 p.m. after being viewed by the Honorable Judge _____ _____ who issued a search warrant.

> Your affiant states that the film in question is the same film viewed by Judge _____ with the exception of certain portions of the film being edited differently than the film viewed by the Honorable Judge _____ _____.
>
> Your affiant states that this copy of the film 'Deep Throat' consists of (1) one additional act of sexual intercourse not shown in the copy viewed by Judge _____ and numerous small changes at different portions of the film."

11. The judge decided he wished to view the film again, and returned with the officers to the theatre at 9:15 p.m. He ordered the officers to execute the warrant, and a third copy of the film was seized.

12. The third warrant was identical to the first and second warrants, but also contained this handwritten notation, describing the property to be seized: "All monies on premises received, in cash drawers or safes at above location." The officers brought a locksmith to the theatre, who opened the business' safe. Money from the cash drawer and the safe totaling $4,082.33 was seized.

13. At 2:30 p.m. the following day, the same officers turned over all the seized items to the judge at his home, and advised him that they believed the movie was going to be shown again.

14. The officers went to the theatre and viewed the film. They returned to the judge's home with another of the identical affidavits, with the same handwritten notation. At 4:00 p.m. the judge signed a search warrant identical to the first three from the day before, with an additional handwritten entry describing the property to be seized: "All monies received, in cash drawers or safes."

15. The warrant was served, and another copy of "Deep Throat", some promotional posters and $197.18 in cash were seized.

16. The theatre ceased exhibition of the movie, closed until November 26, 1974, and thereafter began showing another film.

Plaintiffs in this action are the theatre owner, his property-holding company, and the theatre corporation itself. No criminal complaints are pending against any of them.

Defendants are the District Attorney of the County of Orange, a deputy district attorney, the Chief of Police of the City of Buena Park, and three officers of the Buena Park Police Department.

Plaintiffs filed this lawsuit, basing jurisdiction on 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. In their complaint they seek the return of the motion picture prints seized by defendants, as well as their cash proceeds. In addition, plaintiffs also seek a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 that California Penal Code §§ 311, 311.2 and 311.3 are unconstitutional.

Plaintiffs here have no prosecutions pending against them, and have made no allegations that any are threatened. However, it is clear that they do present a real and actual controversy, and do have standing to challenge the constitutionality of the California obscenity statute, since defendants have seized and continue to hold property of the plaintiffs, property which was seized solely because of alleged violations of the California obscenity statute. The Supreme Court has expressly held that a federal court's jurisdiction under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 is not diminished by any distinction between personal and property rights See Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

The Obscenity Statute

Abstention

The validity of the California obscenity statute (California Penal Code § 311, et seq.) was not determined by the Supreme Court in Miller v. California, supra. The Court, in determining a definition of obscenity which falls outside the protection of the First Amendment, permitted judicial construction of obscenity statutes so that even though the statute on its face violated Miller, it may fall within Miller by judicial construction. Obviously in Miller the Supreme Court did not have the benefit of such construction.

However, since Miller, the California courts have authoritatively construed the California statute with regard to Miller.

In People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973), hearing denied by the California Supreme Court October 24, 1973, the California Court of Appeal determined that the California statute meets the test of Miller.

The defendants assert that Enskat is now the law in California. Auto Equity Sales Inc. v. Superior Court, 57 Cal. 2d 450 (1962) makes it clear in California that the decision rendered by the California Court of Appeal, Second District, Division Five in Enskat is " . . . binding upon all the justice and municipal courts and upon all the superior courts of this state", id at 455. Likewise, although a denial of hearing by the California Supreme Court " . . . is not to be regarded as expressing approval of the propositions of law set forth in the opinion of the District Court of Appeal or as having the same authoritative effect as an earlier decision of [the California Supreme Court], [citations], it does not follow that such a denial is without significance to [that Court's] views," Di Genova v. State Board of Education, 57 Cal. 2d 167, 178 (1962). A denial

of hearing " . . . stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by [the California Supreme Court] or until change of the law by legislative action." Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 306 (1963), quoting from Cole v. Rush, 45 Cal. 2d 345 (1955). See also Klingebiel v. Lockheed Aircraft Corp., ___ F.2d ___ (9th Cir. Feb. 20, 1974), Slip Opinion at p. 2 n. 2, citing Stover v. New York Life Insurance Co., 311 U.S. 464 (1940). Thus, any defense in state court that the statute is defective under the Federal Constitution would be precluded.

In Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971), the Supreme Court recognized that principles of equity, comity and federalism necessarily limited a federal court's power to issue an injunction or a declaratory judgment when a state prosecution was pending. In Steffel v. Thompson, ___ U.S. ___ (March 19, 1974), however, the Court made it clear that neither Younger nor Samuels governed the situation in which there was no pending state prosecution. When, in that instance, the relief sought is declaratory in nature, and jurisdiction is based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), the federal courts have been assigned a "paramount role" in protecting constitutional rights. Steffel, Slip Op. at 20.

The situation presents no danger of "duplicative proceedings or disruption of the state criminal justice system," Steffel at 9. The role of the federal court is unaffected, whether the attack is to the statute on its face or as applied, Steffel at 20-22. Here, the California statute is alleged to be facially invalid, but the decision in Miller v. California, supra, requires this court to pay due regard to the state judicial interpretation of the statute as well. Finally, the fact that there may be related pending criminal prosecutions against some of the theatre employees does not

affect this plaintiff's right to declaratory relief. Steffel at 18 n. 19. No barriers exist to prevent this court from examining the merits of plaintiff's claim.

Constitutionality

In Miller, the standards that state obscenity statutes must meet to comply with the First Amendment are:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

The Court stated, "If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25.

The issue presented is whether the California statute "as written or construed" specifically defines proscribed sexual conduct. The Court in Miller for the first time in its long struggle to define that obscenity which is outside the protection of the First Amendment, adopted a Fifth Amendment fair notice rule. It has long been an established rule of Due Process that no person may be subject to criminal prosecution without "fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954); see also Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

Miller states "We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

It is clear that the California statute on its face does not meet the sound test of Miller, since it does not specifically define the sexual activity which is prohibited. As it reads, there is no fair notice what California permits or prohibits.

There is dispute among law enforcement officials whether the legislature of California could ever draft a statute which meets the test. The County Counsel for the County of Los Angeles in another case pending before this court has stated:

> "The argument of the plaintiff requiring specifically enumerated sexual activity in order to make the obscenity statutes constitutional, must fail because legislatures can't be expected to enumerate and define every possible activity about a perversion known to humans regarding sexual activity. Under the maxim of expression unius est exclusio alterius, plaintiffs' argument would allow certain obscene sexual conduct to be exhibited if it was inadvertently omitted by the Legislation." (Monica Theater, Inc., et al. v. Evelle J. Younger, et al., Case Number 70-2167-ALS. Defendant's Brief, filed November 30, 1973 at p. 2.)

The Court in Miller recognized the concern expressed here by Los Angeles' Deputy County Counsel when it stated "'. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'" 413 U.S. at 27, n. 10.

The California Court of Appeal in Enskat impliedly conceded that the statute as written does not meet Miller. It stated, however, that the statute has been authoritatively construed in the past so as to limit its reach to specifically defined sexual conduct. (At least one federal court has declined to consider the validity of a state obscenity statute solely on the basis of past state cases without the benefit of a post-Miller state court analysis. United Artists Corp. v. Harris, 363 F. Supp. 857 (W.D. Okla. 1973).) Given the particularities that the California statute is missing on its face, it may be that such an undertaking would go beyond the pale of judicial construction and cross over into the realm of legislative drafting. For the moment, however, this court need only address itself to the judicial construction put forth in Enskat.

In reaching their conclusion the state court cited Zeitlin v. Arnebergh, 59 Cal. 2d 901 (1968); People v. Noroff, 67 Cal. 2d 791 (1967); People v. Cimber, 271 Cal. App. 2d Supp. 867 (1969); and Landau v. Fording, 245 Cal. App. 2d 820 (1966). While reference was made in at least two of those cases to sexual acts there involved, none of the state court opinions attempted to delineate standards of obscenity based on specific conduct.

The analysis of those cases that emerges in Enskat is that: (1) only "hard core pornography" is prohibited; (2) nudity, absent a sexual activity is not obscene; and (3) the material must contain a "graphic description of sexual activity." It is clear that the "fair notice" test of Miller is not met.

The term "hard core pornography" is no more precise than the term "obscenity." Jacobellis v. Ohio, 378 U.S. 184 at 201 (1964).

Likewise the mere language "graphic description of

sexual activity" does not meet the specificity test. The Court stated "as a result, we now confine the permissible scope of such regulation to words which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." Miller at 24 (emphasis added). In order to comport with due process, the criminal obscenity statute here must give fair notice of what conduct is criminally proscribed, United States v. Harriss, supra, and the Supreme Court in Miller, by outlining its criteria for "obscenity", has authoritatively indicated what a statute, in its language or its judicial construction, must have to be constitutional. Enskat and the cases cited therein have not supplied a description of specific sexual conduct "as definitely as if it had been so amended by the legislature", Winters v. New York, 333 U.S. 507, 514 (1948). Cf. Beauharnais v. Illinois, 343 U.S. 250, 254 (1952).

In addition to those cases cited by the Court of Appeal in Enskat, People v. Sarong Gals, 27 Cal. App. 3d 46 (1972); People v. Adler, 25 Cal. App. 3d Supp. 24 (1972) and Dixon v. Municipal Court, 267 Cal. App. 2d 789 (1968) have been brought to the court's attention as bearing on the construction of § 311. Sarong Gals involved a civil suit, an in rem action brought under the Red Light Abatement Act, California Penal Code §§ 11225-11235, and the construction of the statutory term "lewdness"; that case is inapplicable to the issues here. Dixon involved the lifting of a writ of prohibition and a remand to the municipal court, holding that the fact that there may have been "simulation" of sexual acts did not bar a finding of obscenity as a matter of law. As the Court there noted, however: " . . . [in] the case before us, we do not have testimony of what was actually done, because prosecution was barred by the writ." 267 Cal. App. 2d

at 793. Adler, like some of the cases cited in Enskat, makes a passing and somewhat vague reference to sexual acts described in the book that was the subject of the action. As with all the cases referred to, however, there is no attempt by the courts of the State of California to formulate a standard of obscenity or a rule of law based upon those specific acts therein mentioned, or upon any specific acts.

The California Court of Appeal, in deciding Enskat, also noted that the statute as presently written imposed "more strict requirements on the prosecution as to the definition of obscenity", because it retains the "utterly without redeeming social value" or Memoirs test which the Supreme Court disavowed in Miller. The California Court of Appeal correctly noted that imposing more strict standards on the government than are required by the Constitution would not make a statute unconstitutional. From that proposition, however, the state court then derived a decision of questionable logic: since the Supreme Court obviously intended to make it "easier" to prosecute obscenity cases after Miller, and since it is harder to meet the California standard of "utterly without redeeming social value" than it is to meet the new test of "lacks serious literary, artistic, political, or scientific value", then the state is not bound to "require increased specificity" in the law. Enskat at 911. This "trade-off" argument is particularly specious. First, the social value test is only one portion of the overall standard developed by the Supreme Court; isolating one portion of the test cannot cure the defects of the whole test. (It is clear that there can be "sexual activity" which is utterly without redeeming value which is so innocuous as to not be included on a list enumerated by a legislature.) Secondly, the zealous inquiry into the "intent" of the Supreme Court reveals nothing

that would justify the contention that it is now supposed to be "easier" to convict purveyors of sexually-oriented materials. The Court in Miller set forth important First and Fifth Amendment principles central to a fair and reasoned system of criminal law, and not a statement of disapproval of works with a sexual theme.

Finally, it has been suggested that footnote 7 in United States v. 12 200-foot Reels of Film, 413 U.S. 123 (1973) permits the type of construction urged upon the court today. If the Supreme Court by that passing reference was announcing new boundaries for the legislative and judicial domains, it is clear that it at best applies only to the particular power the Supreme Court has to construe federal statutes. Without more, that narrow statement can be of no relevance to this determination. For the example of another court unwilling to construe this footnote as an invitation to expand legislative power in the judiciary, see the opinion of the Louisiana Supreme Court in Louisiana v. Shreveport Films Agency, Inc., 42 U.S.L.W. 2344 (Jan. 8, 1974).

In summary, we find (1) the California obscenity statute as written does not meet the specificity test of Miller and (2) the California courts, in interpreting the statute may have liberalized it beyond its wording but have not specifically construed it so as to give fair notice as to what is constitutionally prohibited.[2]

Injunctive Relief

In addition to the prayer for declaratory relief regarding the constitutionality of the statute, plaintiffs seek injunctive relief requiring the return of their seized property. In Steffel the Court held that requests for injunctive and declaratory relief must not be treated as a single issue.

Since there are no allegations that criminal prosecutions are pending or threatened, plaintiffs have not asked this court to stay any state criminal actions. It was that sort of injunctive relief with which the Supreme Court was faced when formulating rules of abstention in Younger v. Harris, supra, Samuels v. Mackell, supra, and Perez v. Ledesma, 401 U.S. 82 (1971).

Plaintiffs here merely seek the return of their seized property. Although equitable in nature, that relief is markedly different from an order which would force a state criminal court to stay its proceedings. While requiring the state to return four copies of the film and approximately $5,000 in gate receipts might have some disruptive influence on a possible future prosecution, or upon prosecutions of others, it is less harsh an interference than a direct injunction against a state proceeding. Nevertheless, for purposes of this analysis, this court will treat this prayer for injunctive relief as any other.

Cases of this sort can often involve dual requests for both injunctive and declaratory relief. See, for example, Perez v. Ledesma, supra (separate opinion of Brennan, J.). Younger v. Harris addressed itself solely to a rule for injunctive relief when a prosecution was pending. In Samuels v. Mackell, plaintiffs sought declaratory relief when a prosecution was similarly pending. The recent case of Steffel v. Thompson, supra, formulated standards for declaratory relief when no prosecution was pending, but specifically declined to rule on whether injunctive relief is appropriate in such an instance. Id. at 10. This court is now faced with that situation in which the Supreme Court has yet to act.

The perimeters of such a rule of law are still unclear; whether the strict doctrine of Younger would apply or not when there is no pending prosecution has been seriously

questioned. See Note, Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution Is Pending, 72 Colum. L. Rev. 874 (1972) at 895 and cases collected therein. At least one court has indicated that federal relief is more appropriate when, as here, the state statute is attacked on its face. Jones v. Wade, 479 F.2d 1176 (5th Cir. 1973) (Wisdom, J.).

Those questions, however, are of only minor importance to this court, since all the elements necessary for injunctive relief under Younger are present here. First, the question of whether these plaintiffs have standing and present a justiciable controversy has already been discussed. This court need only reiterate that defendants are now holding a significant amount of money in which plaintiffs claim a present property right. Second, the posture of § 311 as construed by the California courts is such that it is unlikely the injury could be remedied by a defense in a criminal prosecution. The admonition of abstention in Younger v. Harris must be viewed in light of the fact that the statute involved there (the California Syndicalism Act) had never been reviewed by the state courts since the Supreme Court had overruled Whitney v. California, 274 U.S. 357 (1927) by its decision in Brandenburg v. Ohio, 395 U.S. 444 (1969). A defendant then faced with a prosecution for violating that Act could have set up a defense based upon the unconstitutionality of the statute.

By way of contrast, the California obscenity decision has been finally reviewed in the light of United States v. Miller. The construction of § 311 rendered in Enskat has effectively foreclosed relief in the state courts.

Finally, the objective facts set forth in the first part of this opinion clearly demonstrate bad faith and harassment which would justify federal intervention. Any editorializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie "Deep Throat" out of Buena Park.

The gravamen of the defendants' justification is, of course, that the property is contraband, both the evidence and the fruit of an illegal activity. Such a justification, however, dissipates in the face of a declaration by this court that the statute is invalid.

Pursuant to the provisions of Rule 52(a) this opinion shall constitute the findings of fact and conclusions of law of the court.

Pursuant to the provisions of Rule 58 a separate judgment shall be prepared and entered which shall provide as follows:

1. The California obscenity statute, Penal Code Sections 311 et seq., are in violation of the mandate of the United States Supreme Court as set forth in Miller v. California, 413 U.S. 15 (1973).

2. The defendants shall return to the plaintiffs the property seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park, California.

3. The court retains full and complete jurisdiction over the parties and the causes of action for all purposes.

4. Plaintiffs are entitled to their costs.

DATED: May 6, 1974.

WALTER ELY
United States Circuit Judge

WILLIAM G. EAST
United States District Judge

WARREN J. FERGUSON
United States District Judge

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(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

(b) The provisions of this section with respect to the exhibition of, or the possession with intent to exhibit, any obscene matter shall not apply to a motion picture operator or projectionist who is employed by a person licensed by any city or county and who is acting within the scope of his employment, provided that such operator or projectionist has no financial interest in the place wherein he is so employed.

§ 311.5 Advertising or promoting sale or distribution; solicitation

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Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes, the sale, distribution, or exhibition of matter represented or held out by him to be obscene, is guilty of a misdemeanor.

2. This finding comports with the following decisions which have held the statutes in other states not to comply with the mandate of Miller:

New Jersey

Hamer Theaters, Inc. v. Cryan, 13 Cr.L. 2449; United States District Court for the District of New Jersey (July 26, 1973).

Massachusetts

Commonwealth v. Horton, Commonwealth v. Capri Enterprises, Inc., and Essex Theatre Corp. v. Police Commissioner of Boston, Massachusetts Supreme Judicial Court (April 23, 1974).

Louisiana

Louisiana v. Shreveport News Agency, Inc., 42 U.S.L.W. 2344, Louisiana Supreme Court (January 8, 1974).

Iowa

State v. Cahill and Modelstrom (No. IM2-261), District Court, Linn County, Iowa (August 13, 1973).

North Carolina

State v. Bracken (72 CR 26502) and State v. Cox (72 CR 26503), Superior Court in Greensboro, North Carolina.

Indiana

Stroud v. Indiana (570 S 107) and Mohney v. Indiana (471 S 94), Supreme Court of Indiana (August 21, 1973).

Supreme Court, U. S.
FILED
OCT 17 1973
MICHAEL RODAK, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, as Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as Sheriff of Allen County, Ohio.

Appellants

v.

PURSUE, LTD.

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR APPELLEE

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, As Prosecuting Attorney for Allen County, Ohio, and EDWARD FAIR, as sheriff of Allen County, Ohio,

Appellants

v.

PURSUE, LTD.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Whether actions under the Civil Rights Act (Title 42 United States Code §1983) may be for claims other than racial discrimination; and if they may, whether the Appellee has properly pleaded such a claim?

2. Whether the principles of Younger v. Harris and Samuels v. Mackell apply

where the state action sought to be enjoined is civil in nature?

3. Whether the equitable doctrine of "unclean hands" forecloses a plaintiff seeking relief under Title 42 United States Code §1983, and thereby compels a federal district court from taking jurisdiction and granting relief?

4. Whether the First Amendment is to be used to protect the free speech rights of people rather than places?

5. Whether the constitutionality of the Ohio obscenity laws has any bearing on the constitutionality of the Ohio nuisance laws?

6. Whether the Ohio nuisance laws on their face and as applied violate the First Amendment to the Constitution of the United States because they impose a prior restraint on speech?

STATEMENT OF THE CASE

On September 18, 1972, at 1:06 p.m., Apellant Lawrence S. Huffman, as prosecting attorney of Allen County, Ohio, fled a complaint in the Court of Common Peas of Allen County, Ohio, entitled,

"State of Ohio ex rel Lawrence S. Huffman v. William H. Dakota, et al., Case No. 72 CIV 0326," seeking the abatement of the Cinema I Theatre located at 69 Public Square, Lima, Ohio, as a public nuisance. A copy of said complaint is reprinted in the Appendix at pages C3-14. Such action was commenced pursuant to Section 3767.03 of the Ohio Revised Code (see Appendix at page B-3). At the same time, Appellant Huffman filed his Motion for Temporary Injunction, a copy of which is reprinted in the Appendix at pages C15-17.

On September 20, 1972, Appellant Huffman filed an amended complaint in the Court of Common Pleas and thereafter copies of the Amended Complaint were served upon all of the persons previously served. A copy of the Amended Com-

plaint is reprinted in the Appendix at pages D3-10.

On September 26 and September 27, 1972, the Court of Common Pleas of Allen County, Ohio, convened a hearing on Appellant Huffman's Motion for Temporary Injunction in State of Ohio ex rel Huffman v. William H. Dakota, et al. At the conclusion of the presentation of evidence on September 27, 1972, the court ordered that the matter be continued to October 2, 1972, at which time additional evidence was presented by both the plaintiff and the defendants, after which the parties rested. On October 24, 1972, the Court of Common Pleas of Allen County, Ohio, granted the Temporary Injunction closing the theatre (App., pp.E3-5).

On October 26, 1972, William H.

Dakota, the Defendant in the state abatement action, Ohio ex rel Huffman v. William H. Dakota, et al., filed a civil rights complaint in the United States District Court, Northern District of Ohio, Western Division, entitled "William Dakota v. Edward Fair, Sheriff, and Joe Garlock, Deputy Sheriff, Civil Case No. 72-384," alleging a cause of action under Title 42 United States Code §1983, together with Motions for a Temporary Restraining Order, a Preliminary Injunction, and to convene a 3-judge panel. Dakota also filed a "Memorandum of Law on Effect of Removal on State Court Action" in the Allen County Common Pleas Court on the same date. A copy of said pleadings is reprinted in the Appendix at pages F3-27. Arguments on the Motion for Temporary Restraining Order were

heard on October 30, 1972, and the matter was taken under advisement.

Thereafter, United States Federal District Judge Nicholas J. Walinski, Northern District of Ohio, Western Division, ruled, in an opinion and order filed in said federal action on November 2, 1972, that the injunction of the state court, "has been overbroadly applied" and flew directly in the face of the United States Supreme Court decision in Near v. Minnesota, 283 U.S. 697 (1931), and ordered that the state court injunction be stayed "so far as it affects the showing of films which have not been held to be obscene in a prior adversary hearing." Judge Walinski further stated in his opinion that since the Ohio court may interpret the statute constitutionally upon a hearing for the permanent injunc-

tion, he would "reserve a ruling on the convening of a 3-judge panel under Title 28 United States Code §2284 until such time as the federal abstention doctrine is inapplicable." A copy of Judge Walinski's opinion and order is reprinted in the Appendix at pages G3-5.

On November 17, 1972, Appellee purchased the interest of William Dakota in Cinema I Theatre and obtained by assignment for valuable consideration all rights and duties of William Dakota as lessee of the premises of 69 Public Square, Lima, Ohio. The purchase and assignment of lease became effective on the same date, and Pursue, Ltd. commenced to operate the theatre.

On November 30, 1972, the Court of Common Pleas of Allen County, Ohio, the

Honorable Robert M. Light, Judge, heard testimony in the case of State of Ohio ex rel Huffman v. William Dakota, et al, No. 72 CIV 0326 upon the state's application for a permanent injunction against Defendants therein.

On November 30, 1972, at approximately 2:30 p.m., the Court issued an order of permanent injunction against Defendants thereby ordering the closing of Cinema I for one (1) year and ordering the property therein sold pursuant to Ohio law, Sections 3767.01 et seq. of the Ohio Revised Code (App. pp.I3-6). Within two (2) hours the theatre was padlocked and the keys of Plaintiff's employee were seized by law enforcement agents. (App. p.J9)

Notwithstanding Judge Walinski's opi-

nion and order entered November 2, 1972, in Dakota v. Fair, et al., No. C72-384 (App., pp.G3-5), the Honorable Robert M. Light failed to comply with the opinion as to the impermissibility of prior restraints upon free speech and press guaranteed by the First Amendment to the Constitution of the United States, and effectively enjoined the dissemination of any and all motion picture films, whether or not sexually oriented. (App., pp. I3-6)

On December 1, 1972, the Appellee filed an action in the United States District Court for the Northern District of Ohio, Western Division, entitled Pursue, Ltd. v. Lawrence S. Huffman, in his capacity as Prosecutor of Allen County, Ohio, and Edward Fair, in his capacity as Sheriff of Allen County,

Ohio, CIV 72-432, alleging a Civil Rights cause of action under Title 42 United States Code §1983, together with motions for a temporary restraining order, preliminary and final injunction and application for a 3-judge court. A copy of said complaint is reprinted in the Appendix at pages J3-18.

On December 1, 1972, the same date that the federal action was filed, United States District Court Judge Nicholas J. Walinski entered an order "to prevent great and irreparable harm to the plaintiff, prior to the convening of a 3-judge court in this matter, pursuant to 28 U.S.C. §2248" which ordered the judgment of the Allen County Common Pleas Court in State ex rel Huffman v. William H. Dakota, et al., 72 CIV 0326, dated November 30, 1972, stayed except

"insofar as any order which may apply to films that have previously been declared obscene in a prior adversary hearing". A copy of said order is reprinted in the Appendix at page J-19.

On December 11, 1972, the Sixth Circuit Court of Appeals designated Circuit Judge Anthony J. Celebrezze, District Court Judges Nicholas J. Walinski and Don J. Young as members of the three-judge District Court in Pursue, Ltd. v. Huffman, et al., 72 Civ. 432. On December 21, 1972, said three-judge District Court ordered all parties to file briefs in the matter on or before January 15, 1973. Copies of such orders are reprinted in Appendix at pages L22-25.

On December 29, 1972, Pursue, Ltd. filed amendments to its complaint in

Pursue, Ltd. v. Huffman, et al., 72 Civ. 432, and on January 5, 1973, Appellants filed their answers thereto. A copy of said amendments and answers is reprinted in the Appendix at pages M4-14.

On February 12, 1973, Appellants herein filed three motions in Pursue, Ltd. v. Huffman, 72 Civ. 432, namely: 1. A Motion to Dismiss; 2. A Motion to Dissolve the Temporary Restraining Order; and 3. A Motion for Immediate Hearing. Copies of said motions and the supporting memoranda are reprinted in the Appendix at pages 03-16.

The three-judge Federal District Court heard oral arguments on the temporary restraining order in Pursue, Ltd. v. Huffman, et al., 72 Civ. 432, on March 12, 1973. A copy of the transcript of

the March 12 proceedings (hereinafter referred to by the designation "T") has been lodged with the Clerk of this Court as Exhibit 1 to the Petition for a Writ of Mandate or Prohibition, in Huffman, et al v. United States District Court for the Northern District of Ohio, Western Division, No. 72-1613, on file with this Court.

On April 20, 1973, the court issued its opinion and order holding the closure portions of the Ohio Nuisance Statute, Sections 3767.04 and 3767.06, unconstitutional and enjoined the Appellants herein from executing that portion of the Allen County Common Pleas Court judgment of November 30, 1972, in State of Ohio ex rel Huffman v. William H. Dakota, et al., 72 CIV 0326, which ordered the closing of the Cinema I Theatre at 69 Public

Square, Lima, Ohio, "for a period of one year unless sooner released by order of Court pursuant to the defendant-owners fulfilling the requirements provided in Section 3767.04 of the Revised Code of Ohio ..." (see Appendix at pages A3-12).

A notice of appeal was filed in the United States Supreme Court on May 14, 1973.

On June 1, 1973, Appellants petitioned this Court for a Writ of Mandate or Prohibition in Huffman et al v. United States District Court for the Northern District of Ohio, Western Division, et al, No. 72-1613, and also made application to Justice Potter Stewart for a stay order or writ of injunction, and an order to advance the date set for filing of briefs in opposition to the petition. On June

25, 1973, both matters were referred to and denied by the Court as a whole. Huffman et al v. United States District Court for the Northern District of Ohio, et al., 413 U.S. 918 (June 25, 1973).

The Jurisdictional Statement was filed on August 14, 1973.

SUMMARY OF ARGUMENT

This Court has long held that where a citizen's constitutional rights are violated under color of state law he may bring an action seeking relief therefrom under Title 42 United States Code §1983, and that the violations he seeks relief from need not be those based on racial discrimination. Therefore, as Appellee asserts that its First Amendment rights are being violated by the Appellants under color of state law, it has properly

asserted a claim falling within the ambit of Title 42 United States Code §1983. See Mitchum v. Foster, 407 U.S. 225 (1972).

The Appellee argues further that the principles enunciated in Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971) do not apply to its request for federal intervention and equitable relief. The reasons for this are that those cases apply to situations wherein there are pending state criminal prosecutions, and in this case, the actions that the Appellee claims are wholly contrary to the First Amendment are civil in nature. The state in this case has chosen to prevent the Appellee from exercising freedom of speech through the use of nuisance abatement actions. This Court has recognized that there are different considerations

involved when the actions complained of are civil rather than criminal. See Steffel v. Thompson, ___ U.S. ___, 39 L. Ed.2d 505 (March 19, 1974); Mitchum v. Foster, 407 U.S. 225 (1971); Speight v. Slaton, ___ U.S. ___, 39 L.Ed.2d 367 (February 27, 1974) (per curiam); Lake Carriers Assn. v. MacMullan, 406 U.S. 498 (1972).

Even if, arguendo, Younger v. Harris principles were to apply in the instant case, Appellee argues that its' case nevertheless is a proper one for federal intervention and equitable relief. Enforcement by the state of its permanent injunction against the operation of Cinema I Theatre would be of great, immediate, and irreparable injury to the Appellee. First Amendment rights, paramount among constitutional rights, are

in dire jeopardy. No relief is available to the Appellee in the state courts of Ohio, and the Appellee is forced to forego protected rights in order to avoid continued harassment and prosecution. See, e.g., Steffel v. Thompson, ___ U.S. ___, 39 L.Ed.2d 505; Dombroski v. Pfister, 380 U.S. 479; Kusper v. Pontikes, 411 U. S. 915; Gibson v. Berryhill, 411 U.S. 564; Near v. Minnesota, 283 U.S. 687.

Appellee cannot be prevented from seeking equitable relief when its First Amendment rights are thus endangered and violated because of the misapplication of the equitable doctrine that a party seeking equity must do equity. What Appellants claim is that the Appellee is foreclosed from being granted relief because of a past transgression of the law. Such an argument is absurd and clearly contra-

venes the express holding of this Court in Near v. Minnesota, 283 U.S. 687. Appellants are saying, in effect, that "We'll achieve a prior restraint, one way or the other." Such a contention cannot be countenanced.

Appellant's argument that the land is being restrained, not people, also misses the mark. The First Amendment secures freedom of speech to persons not places. When a place is "restrained", the truth becomes evident that the free speech of persons is what is actually being restrained. The style or nature of the action cannot be allowed to be a device to proscribe free speech where a more obvious and direct proscription would not be tolerated. See, e.g., Bates v. City of Little Rock, 361 U.S. 516 (1960).

Appellants have appealed from a finding of unconstitutionality of the Ohio Nuisance Statutes, having prevailed on the question of the constitutionality of the definition of obscenity contained in Ohio Revised Code §3767.01. The latter question, therefore, is not before this Court. What is before this Court is the use of Ohio Revised Code §3767.04 and §3767.06 as a prior restraint on free speech.

The statutes permit, and have been and are being used for, the closing of a theatre for one (1) year upon the showing that any one film exhibited is obscene. No prior adversary hearings to determine obscenity are provided, and the statutes shift the burden to the operator of the theatre to show the non-obscenity of any film he may wish to exhibit in the future.

This is the essence of censorship, self-censorship, and prior restraint. See Near v. Minnesota, 283 U.S. 687; Freedman v. Maryland, 380 U.S. 51; Smith v. California, 361 U.S. 147.

ARGUMENT

I.

THE APPELLEE HAS STATED A CAUSE OF ACTION PROPERLY INVOKING FEDERAL COURT JURISDICTION

A. TITLE 42 U.S.C. §1983 and §1985 CLEARLY PROTECT AGAINST INCURSIONS OF CONSTITUTIONAL RIGHTS OTHER THAN RACIAL DISCRIMINATION.

There is not the slightest doubt that this Court has consistently held that 42 U.S.C. §1983 and §1985 go well beyond racial discrimination in the protection of the rights of the citizens of the United States. See Mitchum v. Foster, 407 U.S. 225 (1971); Younger v. Harris,

401 U.S. 37 (1971) [and its companion cases]; Dombroski v. Pfister, 380 U.S. 479 (1965); Douglas v. City of Jeanette, 319 U.S. 157 (1943). Any doubt that could possibly be raised as to the applicability of these statutes was put to rest by this Court in Mitchum v. Foster, supra, wherein in recounting the history and purpose of 42 U.S.C. §1983, this Court said:

> Section 1983 opened the Federal Courts to private citizens offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.[30]
>
> [30]As Representative Shellabarger stated, the Civil Rights Act of 1871 "not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to people where, under color of State law, they or any of them may be deprived of rights to which they are

> entitled under the Constitution by reason and virtue of their national citizenship." Cong. Globe, 42d Cong. 1st Sess., App., 68 (1971).

407 U.S. at 239. Thus, the Appellee herein has stated a cause of action within the well-defined parameters of 42 U.S.C. §1983 and §1985.

B. APPELLEE HAS ALLEGED FACTS IN ITS COMPLAINT BELOW STATING A CAUSE OF ACTION UNDER TITLE 42 U.S.C. §1983.

The factual allegations of the Appellee included an adoption by reference of the factual allegations contained in the Complaint filed in Dakota v. Fair, Docket No. C72-384 (Appendix, pp.F3-9), a predecessor and related case to the instant action. Appellee's Complaint (Appendix, pp.J3-18) states that the Appellee (Plaintiff therein) succeeded Dakota in interest to the theatre in question

twenty-two (22) days after the filing of Dakota's Complaint. The latter Complaint alleged the bringing of an action against the Plaintiff (Dakota) for a temporary injunction, the scheduling of a hearing for a permanent injunction, Plaintiff's lack of an adequate remedy at law, the padlocking of his theatre, a judicial determination of non-obscenity of the films in question, and the deprivation of his rights secured to him by federal law and the United States Constitution due to the acts of the Defendants therein under color of state law. Appellee has included all of these allegations by reference and has further alleged that it succeeded Dakota in interest to the theatre in question, that it is being deprived of its rights secured it by the United States Constitution, that an in-

junction against Appellee closing the theatre had been entered, the theatre actually seized and closed, the failure of the state courts to abide by Judge Walinski's order in Dakota v. Fair (Appendix pp. G3-5), and that the action constituted an impermissible prior restraint contrary to the United States Constitution, and that the Appellants (Defendants therein) have established a pattern of conduct seeking to deprive Appellee of its rights secured to it by the United States Constitution.

This Court in Scheuer v. Rhodes, ___ U.S. ___, 40 L.Ed.2d 90 (April 17, 1974), quoted from Conley v. Gibson, 355 U.S. 41 (1957) wherein this Court said, "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dis-

missed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. As the Court in Scheuer v. Rhodes, supra, said, "... the allegations of the complaint should be construed favorably to the pleader." 40 L.Ed. at 96. Thus, the allegations contained in the complaint herein clearly state a cause of action for which Appellee is entitled to relief.

II.

THE THREE JUDGE FEDERAL DISTRICT COURT WAS PROPERLY CONVENED, AND PROPERLY TOOK JURISDICTION OF THE CASE BELOW BECAUSE THE RESTRICTIVE PRINCIPLES OF YOUNGER V. HARRIS WERE INAPPLICABLE TO THE STATE PROCEEDING HEREIN BECAUSE IT WAS (1) COMPLETED EXCEPT FOR FUTILE REVIEW IN THE STATE APPELLATE COURTS, AND (2) THE ACTION BELOW WAS CIVIL RATHER THAN CRIMINAL IN NATURE.

Younger v. Harris, 401 U.S. 37, and Samuels v. Mackell, 401 U.S. 66, both set standards for federal equitable relief in pending state criminal prosecutions. Whatever showing Younger v. Harris may require for federal intervention in state court proceedings, those requirements are clearly inapplicable to the proceedings herein. Mr. Justice Black wrote in Younger that "we express no view about the circumstances under which federal courts may act when there is no prosecution pending in state courts at the time the federal proceeding is begun." 401 U.S. at 41. In the concurring opinion of Mr. Justice Stewart, he stated that "since all these cases involve state criminal prosecutions, we do not deal with the considerations which should govern a federal court when it is asked to inter-

vene in state civil proceedings, where, for various reasons, the balance might be struck differently." 401 U.S. at 55.

In the instant action, there are no pending criminal prosecutions against the Appellee. Rather Appellee is challenging the use of a civil nuisance abatement action which has already come to completion except for enforcement of an injunction against its operation of a theatre. This Court on numerous occasions has recognized the fact that pending civil actions in the state may entail different considerations than where there are pending state criminal prosecutions involved. In Mitchum v. Foster, 407 US. 225, this Court said:

> In short, if a Section 1983 action is not an "expressly authorized" statutory exception, the anti-injunction law absolutely prohibits in

> such an action all federal equitable intervention in the pending state court proceeding, whether civil or criminal, and regardless of how extraordinary the particular circumstances may be.

407 U.S. at 229 (emphasis added).

> Secondly, if Section 1983 is not within the "expressly authorized" exception of the anti-injunction statute, then we must overrule Younger and its companion cases insofar as they recognize the permissibility of injunctive relief against pending criminal prosecutions in certain limited and exceptional circumstances. For, under the doctrine of Atlantic Coastline, the anti-injunction statute would, in a Section 1983 case, then be an "absolute prohibition" against federal equity intervention in the pending state criminal or civil proceeding - under any circumstances whatever.

407 U.S. at 231 (emphasis in original).

This Court was faced with the question of pending state civil proceedings under state nuisance statutes in Speight v. Slaton, ___ U.S. ___, 39 L.Ed.2d 367, but did not have an opportunity to decide the case on its merits. Speight was mooted due to a decision by the Georgia Supreme Court in Sanders v. State, No. 28352, January 28, 1974, ___ Ga. ___, ___ S.E.2d ___, wherein that Court, in the words of this Court, held "that this application of Section 26-2103 'represents an unconstituional prior restraint when construed and applied to authorize the permanent closure of the book store as a public nuisance upon a finding that a single publication, obscene under the standards of Code Ann. §26-2101(b), was sold on the premises.'" ___ U.S. ___, 39 L.Ed.2d at 368. This Court went on to

say in Speight, supra, that:

> It would appear that this Georgia Supreme Court Decision would probably foreclose the state action against which federal injunctive relief was sought by Appellants in this case. In that event, Appellants could obtain full relief in the state court proceedings merely by moving to dismiss the state action, in accordance with state procedural rules, in light of Sanders v. State of Georgia. If that is the case, Appellants could not now make any showing of irreparable injury by reason of the state court proceeding, and such a showing is, of course, required before the federal court could grant equitable relief, apart from any special considerations involved in Younger v. Harris, 401 U.S. 37, 46, 27 L.Ed.2d 669, 91 S.Ct. 746.
>
> We therefore vacate the judgment below and remand to the District Court for reconsideration in light of the decision of the Georgia Supreme Court in Sanders v. State of Georgia, supra.

___ U.S. ___, 39 L.Ed. at 369.

The closest this Court has come to deciding the propriety of federal intervention where there are no pending state prosecutions was in Steffel v. Thompson, ___ U.S. ___, 39 L.Ed.2d 505 (March 19, 1974). This Court said in Steffel that the reservations expressed in Younger v. Harris and Samuel v. Mackell regarding the propriety of federal intervention in the absence of a pending state prosecution, "anticipated the Court's recognition of the relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.' Lake Carriers' Assn. v. MacMullan, 406 U.S. 498, 509, 39 L.Ed.2d 257, 92 S. Ct. 1749 (1972). When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the

state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles." ___ U.S. ___, 39 L.Ed.2d at 516.

Steffel differs from this case in several manners. One is that both injunctive and declaratory relief are being sought here where only declaratory relief was in question in Steffel. Two, this case concerns the constitutionality of the statutes in question both on their face and as applied. And three, Steffel concerned threatened state prosecutions where this case concerns both the absence of criminal prosecutions both pending or threatened[1] and concern a state

[1] There is no "threat here per se, but a threat of criminal prosecutions against

civil action which is no longer pending save for the execution of the injunction granted in the state court.

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1 cont'd.

the Appellee exists in that Appellee must adhere to an unconstitutional prior restraint in order not to contravene the criminal laws of Ohio. Further, Appellants have set a pattern of nuisance abatement actions, thereby effectively "threatening" Appellee with further actions should it continue to show films at any theatre that the authorities personally find offensive. As this Court has said before, sex and obscenity are not synonymous. Kois v. Wisconsin, 408 U.S. 229; Roth v. United States, 354 U.S. 476. Thus, this case is markedly different from cases where future injury would be entirely speculative.

> Here we can only speculate whether respondents will be arrested either again or for the first time, for violating a municipal ordinance or a state statute, particularly in the absence of any allegations that unconstitutional criminal statutes are being employed to deter constitutionally protected conduct.

O'Shea v. Littleton, ___ U.S. ___, 38 L. Ed.2d 674, 684 (Jan. 15, 1974). See

Even assuming, arguendo, that the requirements of Younger v. Harris and Samuels v. Mackell were to be applied where a civil action is in question rather than a criminal action, the case herein would meet those requirements. Contrary to Appellants arguments, a showing of great and immediate irreparable injury is sufficient by itself to permit federal intervention. When a great and immediate deprivation of First Amendment rights is shown in conjunction with the complete and utter absence of any remedy available in the state courts, then, equitable intervention is mandated by Younger v. Harris. And this position

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1 Cont'd.

Steffel v. Thompson, ___ U.S. ___, 39 L. Ed.2d 505, 517 n.12 (Mar. 19, 1974); Golden v. Zwickler, 394 U.S. 103 (1959).

is even stronger when it is considered that we are talking not about the state criminal prosecutions, but about a civil action which is no longer pending but has actually begun to deprive the Appellee herein of its First Amendment rights as granted it by the United States Constitution. As the Court in Steffel said:

> Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. §1983 [42 U.S.C.S. §1983] and 28 U.S.C. §1343(3) [28 U.S.C.S. §1343(3)] -- as they are here -- we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. See, e.g., McNeese v. Board of Education, 373 U.S. 668, 10 L.Ed.2d 622, 83 S.Ct. 1433 (1963); Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961). But exhaustion of state remedies is

> precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution had been commenced.

___ U.S. ___, 39 L.Ed.2d at 522.

Appellants argue that the Appellee here has not exhausted its state remedies. However, to do so would be an exercise of futility. The Ohio Courts have recently upheld the propriety of using a nuisance statute for a prior restraint of allegedly obscene motion pictures. In State ex rel Ewing v. A Motion Picture Film Entitled, "WITHOUT A STITCH", 37 Ohio State 2d 95 (1974), the Ohio Supreme Court said: "This Court holds that R.C. 3767.01 et seq. are applicable in cases involving exhibition of a single motion picture film." 37 Ohio State 2d at 98. Where a decision of the state's highest Court precludes

reversal on appeal then exhaustion of remedies is not required. See Kusper v. Pontikes, 411 U.S. 915 (1973).

The Appellee has shown that it has suffered and is continuing to suffer great and immediate irreparable injury to First Amendment rights secured it by the United States Constitution. The Ohio statutes in question both on their face and as applied clearly constitute a major prior restraint of free speech. If the state injunction is allowed to be executed against the Appellee then the theatre will be closed for one (1) year regardless of what films may or may not be shown in the future and without a prior adversary hearing regarding the alleged "obscenity" of any particular film. The Ohio statutes place a burden on the Appellee, therefore, to show in

advance that they are acting in a constitutionally protected area rather than having the burden on the State to show films are obscene by law before enjoining the showing of a particular film itself. Thus, the Appellee will be forced to act as censor of its own activity.

> There is some question, however, whether a showing of irreparable injury might be made in a case where, although no prosecution is pending or impending, an individual demonstrates that he will be required to forego constitutionally protected activity in order to avoid arrest. Compare Dombroski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965); Hygrade Provision Co., Inc. v. Sherman, 266 U.S. 497, 69 L.Ed. 402, 45 S.Ct. 141 (1925); and Terrace v. Thompson, 263 U.S. 197, 214, 216, 68 L.Ed. 255, 44 S.Ct. 15 (1923), with Douglas v. City of Jeanette, 319 U.S. 157, 87 L.Ed. 1324, 63 S. Ct. 877 (1943); see generally Note, Implications of the Younger Cases for the

Availability of Federal Equitable Relief When No State Prosecution is Pending, 72 Col L Rev 874 (1972).

Steffel v. Thompson, ___ U.S. ___, 39 L. Ed. 2d 505, 517, n.12.

So, in addition to having (1) a civil rather than a criminal proceeding, (2) a "non-pending" rather than a pending proceeding, (3) a showing of great and immediate irreparable injury, and (4) the lack of adequate (indeed any) relief in the state courts, we also show a complete lack of collateral relief procedures (e.g., habeas corpus) as such relief would be available in criminal prosecutions. Younger v. Harris, supra, rests primarily on a principle of comity and federalism permitting a state court to proceed to final adjudication on the belief that state courts will protect federal rights as well as a federal court

may. However, where it is shown, see Kusper v. Pontikes, supra, that no such relief would be available in the state court, as is the case here, where the injury is great, and where no collateral relief such as habeas corpus is available, then the principles requiring non-intervention in Younger clearly cannot apply in the case here. As the Court in Steffel said:

> In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding. Cf. Dombroski v. Pfister, 380 U.S. 479, 490, 14 L.Ed.2d 22, 85 S.Ct. 1116 (1965)

___ U.S. ___, 39 L.Ed.2d at 516.

It is clear, then, that this Court has been developing a theory of law that would necessitate equitable federal intervention in cases such as this where there is no pending criminal proceeding, where there is no adequate remedy at law in the state courts, and where there is a clear showing of great and immediate irreparable injury. As Mr. Justice Brennan said in Lake Carriers' Assn. v. MacMullan, 406 U.S. 498 (1972):

> In Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971), and Samuels v. Mackell, 401 U.S. 66, 27 L.Ed.2d 688, 91 S.Ct. 764 (1971), this Court held that, apart from "extraordinary circumstances," a federal court may not enjoin a pending state prosecution or declare invalid the statute under which the prosecution was brought. The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in

> the absence of a pending state proceeding. In that circumstance, exercise of federal court jurisdiction is appropriate if the conditions for declaratory or injunctive relief are met. See generally Perez v. Ledesma, 401 U.S. 82, 93, 27 L.Ed.2d 701, 710, 91 S.Ct. 674 (1971) (Separate opinion).

406 U.S. at 509-510 (emphasis added). Likewise this Court's opinion in Gibson v. Berryhill, 411 U.S. 564 (1973), also dictates that equitable intervention was appropriate in this case because therein this Court held unanimously that a predicate for a Younger v. Harris dismissal is the opportunity to raise and have timely decided by a competent state tribunal the federal issue involved. As is shown above, such opportunity is completely unavailable in this case.

Thus, in order to prevent the consti-

tutionally impermissible prior restraint involved in this case which constitutes a great and immediate injury to the Appellee, and to obviate the necessity of self-censorship (which the state courts and statutes of Ohio necessarily demand) a federal court must proceed to intervene in this case. Comity and federalism cannot be offended where there is no state prosecution pending and where state procedures will not be upset. This is especially true when First Amendment rights are involved. So given the state's already clear and stated position on the statutes and given the position that the Appellee finds itself in, then intervention is absolutely necessary in order to effectuate the protection of the Appellee's First Amendment rights. See, Freedman v. Maryland, 380 U.S. 51; Blount

v. Rizzi, 400 U.S. 410; Kingsley Books, Inc. v. Brown, 354 U.S. 436; Dombroski v. Pfister, 380 U.S. 479; Near v. Minnesota, 283 U.S. 687.

III.

THE EQUITABLE DOCTRINE OF "UNCLEAN HANDS" IS INAPPLICABLE TO A CIVIL RIGHTS ACTION WHERE A SERIOUS CONSTITUTIONAL CLAIM OF FIRST AMENDMENT VIOLATIONS IS RAISED, COMPLAINTS OF NEAR V. MINNESOTA VIOLATIONS ARE MADE, & A THREE JUDGE DISTRICT COURT WAS PROPERLY CONVENED.

Appellants in their argument seek to deprive the Appellee of First Amendment freedoms by the doctrine of "unclean hands" as surely as they would deprive Appellee of its First Amendment freedoms by a Near v. Minnesota prior restraint. Whether a person or corporation has been "guilty" at one time in the past of showing an obscene film as adjudicated by a court has no relation whatsoever to

whether future activities can be proscribed in advance. The question in this case is whether or not a person can be deprived of First Amendment freedoms for one (1) year upon the basis of the showing of one (1) film. The equitable doctrine Appellants raised goes to the heart of the merits of this case itself. The Appellee claims that its rights have been violated and are continuing to be violated by the closing of the theatre for a year based upon the showing of one film deemed to be "obscene". If this, then, is the question at issue in this case, Appellants would foreclose its being raised and adjudicated on the merits by stating that because the Appellee (or its predecessor in interest) once engaged in this activity, it can no longer come to court because its hands are "unclean".

What may not be accomplished one way in the law surely should not be allowed to be accomplished another way, a way which at the least is subverting and frivolous in nature. See, e.g., Bantam Books v. Sullivan, 372 U.S. 58 (1963); Blount v. Rizzi, 400 U.S. 410 (1971); Carroll v. Comm'rs. of Princess Anne, 393 U.S. 175 (1968); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

IV.

THE FIRST AMENDMENT PROTECTS PEOPLE NOT PLACES AND IT CANNOT BE UNDERMINED BY STYLING THE ACTION AS ONE AGAINST "THE LAND" RATHER THAN AGAINST THE INDIVIDUAL.

The Appellants seek to foreclose review of this case by claiming that the state court action was an in rem action rather than an in personam action. Such a result would be a complete negation of the reality of the situation in the case

below. What an action may be titled is not in issue here. Rather, the concern is with its actual effect. What has occured in the state courts of Ohio is a blatant restriction of First Amendment freedom of expression and speech. It cannot be reasonably controverted that the First Amendment secures freedom of speech to persons and not to places. See, e.g., United States v. Caldwell, 408 U.S. 665; Curtis Publishing Company v. Butts, 388 U.S. 130; Griswold v. Connecticut, 381 U.S. 479; Schneider v. Smith, 390 U.S. 17.

Though the action in the state courts is, in one sense, technically speaking, an action against the property, it is also an action against the parties. (See the style of the action in the state courts in the Appendix at Page C-3).

What is being restrained and what is being affected most of all is not the property per se, but those using property: owners, lessees, and patrons. Under the Ohio nuisance statutes (O.R.C. §3767.04 and §3767.06), only the parties as individuals could relieve the burden of the state injunction against the property. Only they could come to court with the heavy burden of showing the non-obscenity of future materials to abate the nuisance. The property itself could not do this.

It is clear that the First Amendment has a preferred position in the heirarchy of constitutional rights and protections, see Follett v. Town of McCormack, 321 U.S. 573, Thomas V. Collins, 323 U.S. 516, and is a fundamental right accorded persons, see United States v. Caldwell, 408 U.S. 665, Griswold v. Connecticut,

381 U.S. 479, Chaplinsky v. New Hampshire, 315 U.S. 568. Any regulation of speech must be with the highest degree of precision or else First Amendment freedoms will suffer grievous harm, see Blount v. Rizzi, 400 U.S. 410, Keyishian v. Board of Regents, 385 U.S. 559. First Amendment rights are to be protected from subtle interference as well as from a more frontal attack. Bates v. City of Little Rock, 361 U.S. 576. Thus, the Appellants herein should not be permitted to subvert the First Amendment by focusing attention on the style of an action rather than upon its obvious and practical effect.

V.

THE CONSTITUTIONAL STATUS OF THE OHIO OBSCENITY STATUTE O.R.C. §3767.01 IS NOT IN ISSUE HERE, AND A DETERMINATION OF ITS

STATUS IN NO WAY AFFECTS THE UNCONSTITUTIONALITY OF THE OHIO NUISANCE STATUTES §3767.04 AND §3767.06 WHICH ARE IN ISSUE HEREIN[2]

Appellants have made a lengthy argument to the effect that the Ohio obscenity statutes within the nuisance statutes are constitutional and fully comport with this Court's opinion in Miller v. California, 413 U.S. 15. Assuming, arguendo, that obscene films have been shown at the theatre which is the subject of this case, and that the Ohio obscenity law is valid under the test of Miller v. Calif-

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[2] Also not in issue in this case is the removal action in Dakota v. Ohio ex rel. Lawrence S. Huffman, C72-445 (Appendix pp.S-1-3). First, that action was dismissed by Judge Walinski, sua sponte, as moot because of the district court's opinion in Pursue, Ltd. v. Huffman, No. C72-432, which was dated six (6) days prior to Judge Walinski's Order. Secondly, the action appealed from is that of the three-judge district court in Pursue,

ornia, supra, and Harling v. United States, ___ U.S. ___, 41 L.Ed.2d 590 (June 24, 1974), the issue here still remains whether or not the theatre can be closed for the period of one (1) year and the showing of any motion picture forbidden consistent with Near v. Minnesota, 2 283 U.S. 697.

Assuming, arguendo, that a particular film may be deemed obscene after a proper judicial hearing on the merits and under a statute that meets the requirements of Miller v. California, supra, that would still not obviate the necessity of examining whether such a finding

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2 (cont'd) Ltd. v. Huffman, not the removal action in Dakota v. Ohio ex rel. Huffman. Thus, the removal action is not before this Court.

could be used as the basis for the prevention of the showing of any film in the future, such films not having a judicial determination of obscenity under the requirements of Miller v. California, supra.

Thus, the Appellants' argument concerning the constitutionality of Ohio's definition of obscenity in the Nuisance statutes raises two (2) problems. First, even if this statute was the clearest and most precise example of proper statutory regulation of obscenity, per Miller v. California, supra, that would still not reach the question of the propriety of the Ohio Nuisance Statutes O.R.C. §3767.04 and §3767.06. Second, the opinion and order from which Appellants' appeal concerns not the obscenity provisions of the Nuisance Statutes (O.R.C. §3767.01) but

rather the Ohio Nuisance Statutues (O.R. C. §3767.04 and §3767.06). Thus the question is not even at issue and is not before this Court.

VI.

THE OHIO NUISANCE STATUTES O.R.C. §3767.04 and §3767.06, AS WRITTEN AND AS APPLIED, CONSTITUTE AN IMPERMISSIBLE PRIOR RESTRAINT OF FREE SPEECH AND ARE THUS UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THE DOCTRINE ENUNCIATED BY THIS COURT IN NEAR V. MINNESOTA, 283 U.S. 697

The Ohio Nuisance Abatement Statutes (O.R.C. §3767.04 and §3767.06) provide for, and have been used for, the closing of a theatre for a period of one (1) year upon the showing of the obscenity of a single motion picture film that had previously been exhibited. The statutes submit the operator of the theatre to

the burden of coming forth to the courts of Ohio and giving bond and showing evidence, satisfactory to the courts, that any film he might show in the future will not be obscene. Thus, upon the showing of one alleged transgression of the law a theatre may be closed for future speculative transgressions of the law. This Court has, on numerous occasions, held that prior restraints in the area of First Amendment rights comes to the Court with a heavy presumption of unconstitutionality. See Heller v. New York, 413 U.S. 483; Organization for a Better Austin v. Keefe, 402 U.S. 415; Freedman v. Maryland, 380 U.S. 51; United States v. Washington Post Company, 403 U.S. 713; Burstyn, Inc. v. Wilson, 343 U.S. 495; Kingsley Books, Inc. v. Brown, 354 U.S. 436; Chaplinsky v. New Hampshire, 315

U.S. 568; Carroll v. Commissioners of Princess Anne, 393 U.S. 175.

As the Court in Near v. Minnesota, 283 U.S. 697, said:

> In attempted justification of the statute, it is said that it deals not with publication per se, but with the "business" of publishing defemation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitu-

> tional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

283 U.S. at 720.

Thus, the Appellee is forbidden by the Ohio laws to show any film in the future because one film in the past was deemed to be "obscene". No adequate safeguards in the form of a prior adversary hearing is afforded to the Appellee in such an action. All further activity of the theatre is deemed automatically to be a nuisance unless the theatre operator can come forward and show that what he intends to

show in the future will not be obscene. This he has to do without the benefit of an adequate adversary hearing to determine obscenity, and it constitutes an impermissible shifting of the burden to the individual to show the non-obscenity of a particular film rather than being properly on the state to show the obscenity of a film. As the three judge district court said below:

> Unlike the Grove Press case, the present suit does not challenge the Ohio nuisance statute as applied to a single motion picture which has been adjudged obscene in a prior adversary hearing. Rather, we are here faced with an injunction under that statute which bars the showing of any films and closes the theatre "for any purpose" for a period of one year. Although a prior adversary hearing was conducted with respect to some 16 films in the theatre's possession prior to the state court's final judgment, the statute provides for no such hearing on any other films which the operator

may have intended to show during the one-year period.

No less than the injunctive penalties imposed under the state nuisance statute in Near v. Minnesota, supra, the Common Pleas Court's order closing the theatre for one year constitutes an impermissible prior restraint in that no adequate safeguards -- in the form of prior adversary hearings -- are afforded for materials which might be non-obscene and thus protected by the First Amendment. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 65-66 (1963). Compare Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957). The invalidity of this procedure is not removed by the fact that under the statute Plaintiff can obtain a release from the court's order by satisfying the court that the nuisance has been abated. Such a procedure which places upon the individual or corporation the burden of proving that matter which he intends to distribute or exhibit is protected by the First Amendment is "but a step [toward] a complete system of censorship." Near v. Minnesota, supra, 283 U.S. at 721.

(Appendix, pp. A10-11).

The result of such statutes is that one is forced to become a self-censor of material in order to remain in business. Such self-censorship has been on numerous occasions severely scorned by this Court. See Carroll v. Comm'rs of Princess Anne, 393 U.S. 175; Freedman v. Maryland, 380 U.S. 51; Smith v. California, 361 U.S. 147; Kingsley Books, Inc. v. Brown, 354 U.S. 436. Again, as this Court said in the touchstone case of Near v. Minnesota, supra:

> If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandelous and defamatory matter -- in particular that the matter consists of charges against public officers of official dereliction -- and unless the owner or publisher

> is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

283 U.S. at 713 (emphasis added).

Under such a state of affairs, protected as well as unprotected material is proscribed and the individual is forced to become a self-censor. Whatever legitimate interests the state may have, that interest can clearly be served by the use of its criminal statutes for the prosecution of violations of the obscenity laws. Instead, the State seeks not to punish the Appellee for what it may have done, but to punish it for what the State believes it may do in the future. Thus, the serious chilling effect warned of in

Dombroski v. Pfister, 380 U.S. 479, is thrust upon the Appellee as well as all others subject to the statutes. Even when we are not talking about prior restraint, regulation of First Amendment freedoms must be carefully drawn so as not to draw within their scope protected activity. Precision of regulation, it has been said, is a touchstone here, see Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676; Keyishian v. Board of Regents, 385 U.S. 559; Speiser v. Randall, 357 U.S. 513; Blount v. Rizzi, 400 U.S. 410. When such an overbroad statute is used, not only to proscribe current activity, but to proscribe future speculative activity, i.e., prior restraint, then the statutes in question clearly offend all constitutional principles. See Kingsley Books, Inc. v. Brown, 354 U.S.

436; Chaplinsky v. New Hampshire, 315 U.S. 568; Burstyn, Inc. v. Wilson, 343 U.S. 495; Heller v. New York, 413 U.S. 483; Organization for a Better Austin v. Keefe, 402 U.S. 415; Bantam Books, Inc. v. Sullivan, 372 U.S. 58.

Where a State wishes to regulate speech in any form such regulation must be highly precise, for "a state is not free to adopt whichever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech." Marcus v. Search Warrant, 367 U.S. 717, 731. See Speiser v. Randall, 357 U.S. 513; Shelton v. Tucker, 364 U.S. 479. This Court has also said that "our insistence that regulations of obscenity scrupulously embody the most vigorous procedural safeguard ... is ... but a

special instance of the larger principle and the freedoms of expression must be ringed about with adequate bulwarks ...." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963). See Blount v. Rizzi, 400 U.S. 410, 416-17 (1971).

The Ohio nuisance statutes O.R.C. §3767.04 and §3767.06, on their face, and as construed by the Ohio Supreme Court grossly violate the First Amendment to the United States Constitution. They inhibit the dissemination and expression of all speech, based upon one past activity, they force persons to become self-censors and they unconstitutionally shift the burden of the proof of obscenity from the State to the individual. Instead of using the less drastic means of regulating speech as recommended in Shelton v. Tucker, supra, for Ohio does have criminal obscenity laws which they have not

used here, the State has chosen to civilly punish and censor the individuals here.

> For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

Near v. Minnesota, 283 U.S. at 715 (emphasis added).

Finally, contrary to Appellant's argument, the issue does not concern what the Appellee has done in the past, or the fact that a particular film shown is deemed after a proper judicial hearing to be obscene, but whether or not because of such an activity they can be restrained in the future from exhibiting films which are presumptively protected by the First

Amendment to the United States Constitution. The Court in Near, supra, was not concerned with the validity of the charges against the newspaper, nor should the Court herein be similarly concerned by the validity of the obscenity allegations herein.

> We should add that this decision rests upon the operation and effect of the statute, without regard to the question of truth of the charges contained in a particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

283 U.S. at 723 (emphasis added).

CONCLUSION

The three judge district court was properly convened and properly took

jurisdiction of the civil rights action. Younger v. Harris, supra, and Samuels v. Mackell, supra, have no application where the case in question is civil in nature and is "not pending" at the time the suit is brought. Also, the Ohio Nuisance Abatement Statutes, O.R.C. §3767.04 and §3767.06, are unconstitutional on their faces and as applied because they are an impermissible prior restraint on free speech and press.

This Court should affirm the decision below.

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(Submitted with the Consent of the Parties)

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-296

LAWRENCE S. HUFFMAN, *et ano.*,

Appellants,

v.

PURSUE, LTD.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 73-1119

MTM, INC., *et ano.*,

Appellants,

v.

WILLIAM J. BAXLEY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE*

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Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer Inc.
Paramount Pictures Corporation
Twentieth Century-Fox Film Corp.
United Artists Corporation
Universal Pictures, a division of
Universal City Studios, Inc.
Warner Bros. Inc.

MPAA has consistently opposed all prior restraints of expression.[1] The instant appeals, we believe, involve prior restraint in its most egregious form: complete closure of motion picture theatres and a bookstore, thereby preventing their future exhibition or sale of material of any kind. Any decision by this Court on this question will vitally affect the constitutional interests of all segments of the motion picture industry, as well as other media of expression.

MPAA has requested and has received permission from counsel of record for all of the parties to file this Brief *amicus curiae*.[2]

ARGUMENT

Closing a motion picture theatre because of its past exhibition of obscene films, thereby preventing its future exhibition of films of any kind, is an unconstitutional form of prior restraint.

"This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means

[1] See, e.g., MPAA's Brief of *amicus curiae* in *Grove Press, Inc.* v. *Maryland State Board of Censors*, 401 U.S. 480 (1971) (per curiam).

[2] Copies of the letters giving permission are being filed with the Clerk of this Court simultaneously with the filing of this Brief.

which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964).

In these cases the states of Ohio and Alabama sought by civil means to assert their interest in preventing the dissemination of obscene material, an interest whose constitutional legitimacy this Court has recently reiterated. *Miller* v. *California*, 413 U.S. 15 (1973), and companion cases.

However, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731 (1961). "The separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

In No. 73-296, an Ohio court ordered the Cinema I Theatre in Lima, Ohio, closed "for any purpose for a period of one year" because certain films found to be obscene had previously been exhibited at the theatre. The owner of the theatre thereafter sought federal declaratory and injunctive relief. A three-judge federal district court held that the Ohio statutes pursuant to which the state court order had been entered were unconstitutional as applied and enjoined enforcement of the order closing the theatre. *Pursue, Ltd.* v. *Huffman*. — F.Supp. — (N.D. Ohio 1973) (three-judge court).

In No. 73-1119, an Alabama court ordered the Pussycat Adult Theatre and Bookstore in Birmingham, Alabama, closed for an indeterminate period because certain films and printed materials found to be obscene had previously been exhibited at the theatre and sold at the bookstore. The owners of the theatre and bookstore thereafter sought federal declaratory and injunctive relief. A three-judge federal district court held that "the state proceedings here

in question complement, or serve as a substitute for, the criminal laws of the state" and that the complaints should be dismissed on the ground that "plaintiffs have failed to show any of the exceptional circumstances required by *Younger* . . ." *General Corporation* v. *Sweeton*, — F.Supp. — (N.D. Ala. 1973) (three-judge court).[3]

It is MPAA's view that the judgment in No. 73-296 is clearly correct and should be affirmed, and that the judgment in No. 73-1119 is clearly incorrect and should be reversed.

We recognize that the instant appeals present an important issue which this Court has not previously decided: whether the *Younger* line of cases[4] apply when federal relief is sought against a pending state court *civil* proceeding.[5]

Under the *Younger* line of cases, federal injunctive and, ordinarily, declaratory relief is not available against:

> " . . . a pending state court [criminal] prosecution [except] in certain exceptional circumstances—where irreparable injury is 'both great and immediate,' . . . where the state law is ' " 'flagrantly and patently violative of express constitutional prohibitions,' " ' . . . or where there is a showing of 'bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief.' " *Mitchum* v. *Foster*, 407 U.S. 225, 230 (1972).

[3] The district court's decision involved two cases which had been consolidated. Only one of these cases is here on appeal.

[4] *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 82 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971) (per curiam); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971) (per curiam).

[5] In a similar factual setting, this same issue was presented in *Speight* v. *Slaton*,—U.S.—(1974) (per curiam), but the Court did not decide it.

However, we do not believe it is necessary for this Court to decide here whether the *Younger* principles apply when a pending state court civil proceeding is involved. For even assuming, *arguendo*, that they do apply, federal intervention was clearly appropriate in the instant cases. Indeed, these cases presented extraordinary circumstances in which federal intervention was "essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum* v. *Foster*, *supra* at 242.[6]

The only constitutionally cognizable interest of the states in the instant cases was their right to prevent the sale or exhibition of obscene material.[7] Yet, rather than an order which "studiously withholds restraint upon matters not already published and not yet found to be offensive," *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 445 (1957), the orders entered by the Ohio and Alabama courts prevented *any* future expression, obscene or nonobscene. "Surely, this is to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

As this Court observed in *Carroll* v. *Princess Anne*, 393 U.S. 175, 183-184 (1968):

> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle funda-

[6] The plaintiffs in the federal district courts below were under no obligation to resort to the state appellate process and await the outcome of their appeals when (1) their theatres would remain closed during the pendency of those appeals, and (2) even a favorable outcome on appeal could not redress the irreparable injury they would already have suffered. *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

[7] These cases do not, for example, involve the violation of valid health, safety or fire laws.

> mental personal liberties when the end can be more narrowly achieved.' *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case."

By contrast, the state court orders in the instant cases were "not reasonably restricted to the evil with which [they are] said to deal," *Butler* v. *Michigan*, *supra* at 383, but rather created "a complete system of censorship." *Near* v. *Minnesota*, 283 U.S. 697, 721 (1931). There is absolutely no difference between these orders and the injunction prohibiting "defendants from showing any and all films obscene or otherwise" which the Supreme Court of Tennessee held invalid in *New Riviera Arts Theatre* v. *State*, 412 S.W.2d 890 (1967). All such orders are the functional equivalent of a statute which is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph. . . ." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941). Under such circumstances, federal intervention was clearly appropriate, even under *Younger* principles.

Moreover, just like a "mass seizure of the tools and equipment required to prepare the newspaper . . . [which thus] disabled appellee from publishing future issues," *Dyson* v. *Stein*, 401 U.S. 200, 204 (1971) (per curiam) (concurring opinion of Brennan, *J.*), the state court orders in the instant cases clearly created irreparable injury. Again, federal intervention was appropriate, even under *Younger* principles.

As the Supreme Court of Georgia recently observed in striking down an order similar to those involved in the instant cases:

> "One obscene book on the premises of a book store does not make an entire store obscene. The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of . . . procedural safeguards and creating an unconstitutional [prior] restraint upon appellant. This broad result cannot be reconciled with free expression under our [state and federal] Constitutions." *Sanders* v. *State*, — Ga. —, 203 S.E.2d 153, 157 (1974).[8]

See also: *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, — La. —, 287 So.2d 480 (1973); *Airways Theater, Inc.* v. *Canale*, — F.Supp. — (W.D. Tenn. 1973) (three-judge court) (per curiam).

The issue in the instant cases is therefore prior restraint in its baldest form.[9] On the basis of past abuses, the orders entered by the Ohio and Alabama courts prevented future exhibition of films of any kind—films unmade as

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[8] On the basis of the same rationale, numerous lower court decisions have held that revocation of theatre or bookstore licenses, or the refusal to grant or renew such licenses, also constitutes an invalid form of prior restraint. See, e.g., *City of Seattle* v. *Bittner*, 81 Wash. 2d 747, 505 P.2d 126 (1973); *Avon 42nd Street Corp.* v. *Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Perrine* v. *Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. denied, 404 U.S. 1038 (1972); *Oregon Bookmark Corporation* v. *Schrunk*, 321 F.Supp. 639 (D.Ore. 1970). In our view, these decisions were clearly correct. Cf. *106 Forsyth Corporation* v. *Bishop*, 362 F.Supp. 1389 (M.D.Ga. 1972), aff'd per curiam, 482 F.2d 280 (5th Cir. 1973), petition for certiorari pending (No. 73-1176).

[9] We recognize that this Court has held that a system of prior restraint is not invalid *per se* in the case of motion pictures. *Times Film Corp.* v. *Chicago*, 365 U.S. 43 (1961). Nevertheless, such a system is valid only if it contains certain procedural safeguards, which clearly were not observed in the instant cases. *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968) (per curiam); *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971).

well as unseen. The orders provided "no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

Closing a motion picture theatre because of its past exhibition of obscene films, thereby preventing its future exhibition of films of any kind, is clearly an unconstitutional form of prior restraint. It is no different than destroying a printing press because some of the books previously printed on it were obscene.

Certainly, the infringement on First Amendment rights created by the state court orders in the instant cases was much more egregious than restraints which this Court has already held unconstitutional. *Marcus* v. *Search Warrant*, *supra*; *Bantam Books, Inc.* v. *Sullivan*, *supra*; *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Lee Art Theatre* v. *Virginia*, 392 U.S. 636 (1968) (per curiam); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973).

What this Court said in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 418-419 (1971), is equally applicable here:

> "Under *Near* v. *Minnesota*, . . . the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates . . . to suppress, on the basis of previous publications, distribution of literature 'of any kind' . . . ."

In short, this Court need not decide here whether *Younger* principles apply when federal relief is sought against a pending state court civil proceeding. For even assuming they do apply, federal intervention was clearly appropriate—indeed, necessary—in the instant cases.

CONCLUSION

For the reasons set forth above, the judgment in No. 73-296 should be affirmed and the judgment in No. 73-1119 should be reversed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served three copies each of this Brief of Motion Picture Association of America, Inc. as *Amicus Curiae* upon counsel of record for each of the parties by depositing copies of said Brief in the United States Mail, properly addressed and with sufficient postage thereon to insure delivery by air mail.

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